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No.

Supreme Court of the United States

October Term, 1983

NORMAN E. WYMBS, ANN R. CASSADY, and JACK L. MOSS,
Petitioners,

vs.

REPUBLICAN STATE EXECUTIVE COMMITTEE OF FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

WHETHER AN ACTION CHALLENGING A BINDING STATE CONDUCTED PRESIDENTIAL PRIMARY IN WHICH THERE IS A SUBSTANTIAL GEOGRAPHICAL DISPARITY IN VOTING STRENGTH IS JUSTICIABLE.

TABLE OF CONTENTS

QUESTION FOR REVIEW I
TABLE OF AUTHORITIES III
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS, ETC. 2
STATEMENT OF THE CASE 2
JURISDICTION OF THE DISTRICT COURT 3
ARGUMENT 4

APPENDIX—

Section 103.101, Florida Statutes A1
Rules of the Republican Party of Florida (1979) A7
Section 104.011 and 104.41, Florida Statutes A14
Memorandum Opinion, United States District Court, Northern District of Florida A15
Opinion of the United States Court of Appeals, Eleventh Circuit A40
Rule No. 30, Rules of the Republican Party of the United States (1980) A85
Excerpts of Rule No. 31, Rules of the Republican Party of the United States (1980) A87

TABLE OF AUTHORITIES

Cases

Cousins v. Wigoda, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed. 2d 595 (1975) 4

Democratic Party of the United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed. 2d 82 (1981) 4, 7

Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed. 2d 821 (1963) 4, 5, 6, 8, 9

Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed. 2d 1 (1968) 5, 6

O'Brien v. Brown, 409 U.S. 1, 92 S.Ct. 2718, 34 L.Ed. 2d 1 (1972) 4

Redfearn v. Delaware Republican State Committee, 362 F.Supp. 65 (D. Del. 1973) affd. 524 F. 2d 1403 (3d Cir. 1975) 6

Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1943) 4-5

Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1952) 5

United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1940) 4

Florida Statutes

Section 103.101, Florida Statutes 2

Sections 104.011 and 104.41, Florida Statutes 2

Miscellaneous

Fourteenth Amendment, United States Constitution 3

Rule 11, Section Rules of the Republican Party of Florida 3

28 U.S.C., Sections 1331 and 1334 3

28 U.S.C., Section 1254 1

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OPINIONS BELOW

Memorandum Opinion of the U.S. District Court, Northern District of Florida, filed September 21, 1982.

Wymbs v. Republican State Exec. Committee of Fla., 719 F. 2d 1072 (11th Cir. 1983).

JURISDICTION

The Opinion of the court below was dated October 31, 1983. Jurisdiction of this Court is conferred by 28 U.S.C., § 1254(1).

CONSTITUTIONAL PROVISIONS, ETC.

Copies of all cited provisions, statutes and rules are set forth in full in the Appendix.

STATEMENT OF THE CASE

In January 1980, Plaintiffs filed their complaint challenging the constitutionality of the rules of the Republican State Executive Committee of Florida which provide for the allocation of delegates in the Florida presidential primary.

Florida provides by statute[1] for the selection of delegates to the Republican National Convention in a Presidential primary. Florida law[2] authorizes the Republican State Executive Committee to adopt rules designating the number of delegates and the procedure for their selection. In accordance with the statute, the Executive Committee adopted rules[3] which provide for the winning candidate to receive three delegates from each Congressional district, regardless of the number of registered Republicans in the district.[4] Delegates are bound by state law to support at the convention the winning candidate in their districts.[5]

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1. Section 103.101, Florida Statutes. [App. A1-A6]

2. *Id.*

3. [App. A7-A13]

4. Only the names of the candidates appear on the ballot. Actual delegates are selected later from names submitted by the winning candidate.

5. The delegate must file a "qualification oath" with the Secretary of State pledging to support at the convention the candidate to which he or she was allocated. § 103.101(6), Fla. Stat. [App. A3] Failure to abide by the oath subjects the delegate to severe criminal penalties. §§ 104.011, 104.41, Fla. Stat. [App. A14]

The State Executive Committee has incorporated by reference into the Party's state rules the Florida Statutes regulating the primary election, including the provision binding delegates to the result.[6]

There is a wide disparity in the numbers of registered Republicans in the fifteen Congressional districts in Florida. The 143,814 registered Republicans in the Eleventh District, where two of the Plaintiffs reside, are allocated the same number of delegates as the 18,936 registered Republicans in the Third District. Thus, Republicans in the Third District have 7.5 times the voting strength of Republicans in the Eleventh District in the selection of the Republican nominee for President of the United States.

The District Court held that the case was justiciable, that the challenged conduct constituted state action, and that the result of such action was a violation of the Plaintiff's rights as guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[7] The Court of Appeals for the Eleventh Circuit reversed, holding that the case failed to raise a justiciable issue.[8]

JURISDICTION OF THE DISTRICT COURT

Jurisdiction of the District Court was based upon 28 U.S.C., §§ 1331 and 1334 and the Fourteenth Amendment to the United States Constitution.

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6. Rule 11, Section 10, Rules of the Republican Party of Florida. [App. A13]

7. [App. A15-A39]

8. [App. A40-A84]

ARGUMENT

It is important to note at the outset that this case does not involve the right of a political party to determine which of several competing delegations will be seated at its national convention, as was the case in *Cousins v. Wigoda*,[9] and *O'Brien v. Brown*,[10] or the primacy of party policy over state statute as to the method of selecting delegates to the national convention as was the case in *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*.[11] What this case does involve is the collaboration between a political party and the State of Florida in the conduct of a public election which is pervasively regulated and enforced by the State and which grossly dilutes the voting power of some citizens in favor of others. As this Court succinctly stated in *Gray v. Sanders*, "[T]he present case is only a voting case."[12]

Whatever uncertainty may have existed with regard to the justiciability of other equal protection claims, the accessibility of public elections to judicial scrutiny has always remained inviolate. Thus, this Court has consistently recognized that questions relating to equality of voting power at any stage of a public election, including primaries, are justiciable:

> All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote. *United States v. Classic*, 313 U.S. 299, 314-318, 85 L.Ed. 1368, 1376-1379, 61 S.Ct. 1031; *Smith*

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9. 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed. 2d 595 (1975).

10. 409 U.S. 1, 92 S.Ct. 2718, 34 L.Ed. 2d 1 (1972).

11. 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed. 2d 82 (1981).

12. 372 U.S. 368, 378, 83 S.Ct. 801, 9 L.Ed. 2d 821 (1963).

v. Allwright, 321 U.S. 649, 664, 64 S.Ct. 757, 88 L.Ed. 987, 997, 151 A.L.R. 1110.[13]

The Court's reference to "all procedures" which form a part of the election process echoed its earlier comment in *Gray v. Sanders*:

> The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections . . .[14]

The lower Court's suggestion that Fifteenth Amendment consideration will justify judicial scrutiny only in cases of racial discrimination is squarely at odds with this Court's holding in *Gray v. Sanders*:

> If a state in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that discrimination was allowable. See, *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152. How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in the smallest rural county?[15]

Gray v. Sanders involved a challenge to the Georgia primary system in which the candidate for nomination receiving the most votes in each county received two votes for nomination regardless of the population in the county.[16]

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13. *Moore v. Ogilvie*, 394 U.S. 814, 818, 89 S.Ct. 1493, 23 L.Ed. 2d 1 (1968).

14. *Gray v. Sanders*, *supra*, at U.S. 380.

15. *Id.*, at 379.

16. At the time that *Gray* was decided, Georgia had nonpartisan voter registration in its primaries and the question of party registration was not in issue.

The District Court in the case at Bar found that, "the bracket system of weighting votes by county units attacked in Gray resembles Florida's system for weighting votes by congressional districts in both form and substance for purposes of state action." The District Court in *Gray* held that the issue was justiciable, and this Court agreed, stating:

> Georgia gives every qualified voter one vote in a statewide election; but in counting those votes, she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights the small rural counties heavier than other larger rural counties.[17]

The Court concluded that the Georgia system violated the Fourteenth Amendment to the United States Constitution.

The decision of the Eleventh Circuit not only conflicts with *Moore* and *Gray*, but directly conflicts with the decision of the Third Circuit in *Redfearn v. Delaware Republican State Committee*.[18] *Redfearn* involved a fact situation directly analogous to the case at Bar. The Plaintiffs challenged rules adopted by the Republican State Committee which allocated delegates to the National Convention among the various state districts without consideration of the numbers of registered Republicans in such districts. In holding that the formula violated the Fourteenth Amendment, the Court directly addressed the question of justiciability. The District Court found that the case was justiciable, and the Third Circuit affirmed.

The Court below held that the case at Bar was not justiciable on several grounds. First, the Court concluded

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17. *Id.*, at U.S. 379.

18. 362 F.Supp. 65 (D. Del. 1973) affd. 524 F. 2d 1403 (3d Cir. 1975).

that the requested relief would require the Court "to engage in political party policy making", citing this Court's recent decision in *Democratic Party of the United States v. Wisconsin ex rel. LaFollette, supra.* The *LaFollette* decision is inapposite. There was no suggestion in *LaFollette* that the Party rules were unconstitutional or that the State collaborated with the Party in adoption or enforcement of the rules. To the contrary, the case stood for the proposition that where there is a conflict between a state statute and party rules as to the manner in which convention delegates are selected, the party rules prevail. Plaintiffs readily concede that the Republican party is not obligated to seat a delegation selected by a state primary election. However, if the party chooses to have its delegates selected in a public election and collaborates with the state in the conduct of the election and the enforcement of the results, then such election must be conducted in accordance with the Equal Protection Clause and a challenge to the election on Equal Protection grounds is justiciable.

The second basis for the lower court's conclusion that there is no justiciability was the fact that the District Court's opinion required that the equality of voting strength be based upon Republican registration rather than population. In this respect, the Eleventh Circuit is in direct and irreconcilable conflict with the Third Circuit as reflected in *Redfearn v. Delaware Republican State Committee, supra.* The lower court's premise that population is the only criterion against which to measure the one-man, one-vote standard ignores the substance of the one-man, one-vote concept. Population can itself be a distortion of equal representation if it does not reflect the constituency being represented. In the Florida Presidential primary, the delegates are being elected for the purpose

of carrying to the convention the will of Florida's registered Republicans as to whom the nominee should be. In performing their function of casting ballots for the nominee, the delegates have a singular duty and represent no constituency other than registered Republicans. This Court defined the criterion clearly in *Gray v. Sanders*:

> . . . [O]nce the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.[19]

In the Florida Presidential primary there is only one class of voters: registered Republicans.

The lower court also based its determination that the case was not justiciable upon its conclusion that the trial court's injunction would not be binding and conclusive. The trial court had declared the State Executive Committee's rule relating to selection and allocation of delegates unconstitutional and had enjoined the state party from proceeding in accordance with the rule. The Circuit Court concluded that the injunction would provide no relief since the national party would still have the power to refuse to seat the Florida delegation.[20] The Court failed to recognize the critical difference between the seating of delegations at the national level and the selection of delegates at the state level. This Court has made clear the fact that the party has a broad discretion in determining which delegations to seat at the convention and in deciding whether or not to embrace the state election machinery in the selection of its delegates. However, once a party has

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19. *Gray v. Sanders, supra*, at U.S. 381.

20. There was nothing in the record to suggest that the national convention would be any less likely to seat a Florida delegation elected in accordance with a constitutional rule.

decided that its delegates will be selected in a public election which is conducted, regulated and enforced by the state, surely the party cannot then insist that the election be conducted in an unconstitutional manner by threatening that it otherwise might not seat the delegates.

Finally, the lower Court states that it would not be practicable to utilize party registration figures since the only time they are static is during the thirty day closure periods prior to the primary elections. If these closure periods were used to apportion the delegates, according to the lower Court, "delegate candidates would not know against whom or in what district they would be running until thirty days before the election." In the first place, the lower Court ignores the fact that delegates do not run in the Florida Presidential primary. Only the names of the Presidential candidates appear on the ballot and delegates are selected later to fill the slots apportioned to the candidates according to the results. Even if the lower court had been correct, however, the convenience of the candidates is no justification for a gross distortion of voting power.

In summary the decision of the Eleventh Circuit would remove from judicial scrutiny all questions of equal protection in state conducted Presidential primary elections.[21] The decision is in direct conflict with decisions of this

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21. The significance of direct primaries to the nomination of major party Presidential candidates cannot be underestimated. The 16 states holding direct primaries at the time *Gray v. Sanders* was decided had grown to 37 states in 1980, accounting for the selection of more than half of the total delegates to each major party's national convention. The Eleventh Circuit's decision on justiciability raises the specter of Americans being limited to the choice of two Presidential candidates, both of whom have been nominated by small minorities of their respective parties.

Court and the Third Circuit. If this Court does not grant *certiorari*, it would leave unresolved a highly important constitutional question affecting this country's most significant election.

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APPENDIX

FLORIDA STATUTES

103.101 Presidential preference primary.—

(1) Each political party other than a minor political party shall, on the second Tuesday in March in each year the number of which is a multiple of 4, elect one person to be the candidate for nomination of such party for President of the United States. Each elector of such party may vote his preference for one person to be the candidate for nomination of such party for President.

(2)(a) The name of any candidate for a political party nomination for President of the United States shall be printed on the ballots upon the direction of a Presidential Candidate Selection Committee composed of the Secretary of State, who shall be a non-voting chairman, the Speaker of the House of Representatives, the President of the Senate, the minority leader of each house of the Legislature, and the chairman of each political party required to have a presidential preference primary under this section. Each year a presidential preference primary is held, the Secretary of State shall prepare and publish a list of names of presidential candidates who are generally advocated or recognized in news media throughout the United States or in the state. The Secretary of State shall submit such list of names of presidential candidates to the selection committee on the first Tuesday after the first Monday in January each year a presidential preference primary election is held. Each person designated by the Secretary of State as a presidential candidate shall appear on the presidential preference primary ballot unless all committee members of the same political party as the

candidate agree to delete such candidate's name from the ballot. The selection committee shall meet in Tallahassee on the first Tuesday after the first Monday in January each year a presidential preference primary is held. The selection committee shall publicly announce and submit the names of presidential candidates who shall appear on the presidential primary ballot to the Department of State no later than 5 p.m. on the following day. Within 5 days from receipt of such list, the Department of State shall notify each presidential candidate designated by the committee. Such notification shall be in writing by registered mail with return receipt requested.

(b) Any presidential candidate whose name is not selected by the Secretary of State or whose name is deleted by the selection committee may request in writing to the chairman of the selection committee, prior to the third Tuesday after the first Monday in January each year a presidential preference primary election is held, that his name be placed on the ballot. On the third Tuesday after the first Monday in January the Secretary of State shall convene the committee to consider such requests. If any member of the selection committee of the same political party as the candidate requests that such candidate's name be placed on the ballot, the committee shall direct the Department of State to place the candidate's name on the ballot. Within 5 days after such meeting, the Department of State shall notify the presidential candidate that his name will appear on the ballot.

(3) A candidate's name shall be printed on the presidential preference primary ballot unless he submits to the Department of State, prior to the third Tuesday after the first Monday in January, an affidavit stating that he is not now, and does not presently intend to become, a candidate for President at the upcoming nominating con-

vention. If a candidate withdraws pursuant to this subsection, the Department of State shall notify the state executive committee that the candidate's name will not be placed on the ballot. The Department of State shall, no later than the fourth Tuesday after the first Monday in January, certify to each supervisor of elections the name of each candidate for political party nomination to be printed on the ballot.

(4) The names of candidates for political party nominations for President of the United States shall be printed on official ballots for the presidential preference primary election and shall be marked, counted, canvassed, returned, and proclaimed in the same manner and under the same conditions, so far as the same are applicable, as in other state elections.

(5) The state executive committee of each party, by rule adopted at least 90 days prior to the presidential preference primary election, shall determine the number, and establish procedures to be followed in the selection, of delegates and delegate alternates from among each candidate's supporters. However, no more than 25 percent of the total number of delegates may be elected by the state executive committee. A copy of any rule adopted by the executive committee shall be filed with the Department of State within 7 days after its adoption and shall become a public record.

(6) Any person selected as a delegate or delegate alternate to the national convention shall file a qualification oath with the Department of State, pledging support at the convention to the candidate of his party for the office of President of the United States that he was selected to support. The oath shall state that the delegate or delegate alternate affirms to support such candidate until the candidate is either nominated by such convention or re-

ceives less than 35 percent of the votes for nomination by such convention during any balloting, or until the candidate releases the delegates from such pledge and any other oath as prescribed by the Department of State. No delegate shall be required to vote for such candidate after two convention nominating ballots have been taken.

(7) Any delegate to a national convention whose presidential candidate withdraws after being entitled to delegate votes pursuant to this section shall be an unpledged delegate to the national convention.

(8) Delegates shall be allocated among the candidates by one of the following two methods:

(a) The presidential candidate receiving the highest number of votes in any congressional district shall receive all delegate votes from such congressional district. The presidential candidate receiving the highest number of statewide votes shall receive all statewide delegate votes and all votes of delegates chosen by the state executive committee of the candidate's party.

(b) When provided by party rule, delegates at the congressional district level and at the statewide level shall be allocated among the several candidates on the basis of the proportion that the number of votes each candidate receives bears to the total number of votes cast for the candidates of the same party at the congressional district or statewide level. Such party rule shall provide that delegates need not be allocated to any candidate receiving less than 15 percent of the votes cast for candidates of his political party at the congressional district or statewide level. Such party rule shall also provide that the entire number of delegates for a given congressional district and the entire number of statewide delegates be allocated among only those candidates receiving over 15 percent

of the vote. In the event that delegates are to be chosen pursuant to the provisions of this paragraph, the Secretary of State shall cause the words "No Preference" to appear on the presidential preference primary ballot after the names of the candidates of any political party electing to utilize the provisions of this paragraph. An elector may cast his vote for such designation in the same manner that he casts a vote for a candidate of that party. In the event that the number of votes cast for such designation at the district or statewide level is at least 15 percent of the total votes cast for the ballot of such party at that level, delegates shall be allocated in the manner prescribed above. Delegates so allocated shall be considered uncommitted delegates and shall be chosen in the manner prescribed by party rule for delegates allocated to candidates. When delegates are to be allocated according to the provisions of this paragraph, the number of delegates that each candidate is to receive shall be rounded to the nearest whole number.

(9) The Department of State shall place the candidates' names on the ballot in alphabetical order. The ballot as prescribed in this section shall be used.

(10) The form of the presidential preference primary ballot shall be in substantially the following form:

OFFICIAL PRESIDENTIAL PREFERENCE
PRIMARY BALLOT

No. .... Party

..... COUNTY, FLORIDA

Precinct No. .....

(Date) .....

(Signature of Voter) ..... (Initials of Issuing Official) .....

A6

Stub No. 1

OFFICIAL PRESIDENTIAL PREFERENCE
PRIMARY BALLOT

No. .... Party

..... COUNTY, FLORIDA

Precinct No. .....

(Date)

(Initials of Issuing Official)

Stub No. 2

OFFICIAL PRESIDENTIAL PREFERENCE
PRIMARY BALLOT

..... Party

..... COUNTY, FLORIDA

Precinct No. .....

(Date)

Place a cross (X) in the blank space to the right of the name of the presidential candidate for whom you wish to vote.

For President

(Name of Candidate) ☐

(Name of Candidate) ☐

REPUBLICAN PARTY OF FLORIDA

PARTY RULES OF PROCEDURE

(Revised as of December 18, 1979)

RULE 1. *Use of the Name Republican*

No person or group of persons shall use the name, abbreviation or symbol of the Republican Party in connection with any club, group, association or organization of any kind unless approval and permission have been given in writing by the chairman of the Republican State Executive Committee and at least two of the following officials of that county, state committeeman, state committeewoman and county chairman. This subsection shall not apply to county executive committees of the party and organizations which are chartered by the national executive committee of the party, or to organizations using the name of the party that have been in existence and organized on a statewide basis for a period of ten (10) years.

A club or organization whose area of membership includes more than one county shall require only the approval of the state party chairman and the executive board. Once the approvals are granted, a charter shall be issued to the requesting club or organization by the Republican State Executive Committee.

No chartered club or organization using the name Republican shall participate in intra-party differences nor shall it, as an organization, seek to influence the nomination of any Republican candidate. This rule shall not apply to clubs associated with the Florida Federation of Young Republicans nor the Florida Federation of Republican Women since they obtain their charters from their national organizations.

A club or organization's charter may be revoked for just cause by the same voting procedure of county officials and state chairman as outlined in paragraph 1 of this rule.

RULE 2. *National Committee Members*

There shall be elected by the state executive committee a national committeeman and a national committeewoman to be designated the nominees from the state of Florida to serve on the Republican National Committee. The election shall be held at a regular or special meeting of the state executive committee in 1972 and each four years thereafter, at least fifteen (15) days prior to the presidential nominating convention of the Republican Party. The state chairman shall conduct the election. Candidates shall be registered Republicans in the state of Florida and shall be nominated from the floor at the time of the election. Voting shall be by written secret ballot.

RULE 3. *Use of Proxies*

The holder of a valid proxy, which shall be in writing and held by a person who shall be a registered Republican in the area served by the person for whom he holds the proxy, may use the proxy for all purposes as if the person whose proxy he holds is present. The state executive committee member who attends by proxy is counted as present for all purposes including the purposes of determining whether or not there is a quorum. Proxies will be allowed for state committee district caucuses and caucuses of county chairmen. A county executive committee member who attends by proxy is counted as present for all purposes; however, each county committee shall have the option as to whether to allow a proxy to count as an excused absence for the absent member

RULE 4. *County Chairman Election*

In the event of contest of the validity of the election of a county chairman from a congressional district to serve on the state executive committee, the question of the proper person to serve shall be reviewed by the executive board, and the county chairman determined by the executive board to be proper shall be seated until the next annual or special meeting of the full committee, at which time the executive board shall report to the full committee and the action of the executive board shall be subject to ratification or change by the full committee.

RULE 5. *Vacancies - Public Office*

The following procedure shall be used to fill vacancies in nominations as provided by this section.

a) County Office: Vacancy in a county office shall be filled by majority vote of a quorum present at the duly called meeting of the county executive committee.

b) District Office: Any office which crosses county lines and includes parts of more than one county. Vacancy in a district office shall be filled by a majority vote of a quorum present (proxies shall not be allowed) at the duly called meeting of the members of the state executive committee and county chairmen from the counties comprising the area involving the district office, which vote shall be cast proportionately to each county's percentage of the total party registration within the election district and allocated equally to each voting member present, providing that no county's total vote shall exceed the allocated percentage for that county. For the purpose of this rule, party registration shall be based on the last certification to the Secretary of State. District vice-chairmen from the districts involved may attend and act in an ex-officio capacity without vote.

c) State Office: Vacancy in a state or Federal office shall be filled by a majority vote of a quorum present at the duly called meeting of the members of the state executive board.

RULE 6. *Election of Precinct Committeemen and Women*

Each precinct within each county shall, except as otherwise provided in this rule, the party constitution, or state law, elect one man and one woman to serve as Precinct Committeeman and Precinct Committeewoman. Provided however that any precinct with more than 1000 registered voters in either party shall elect two Precinct Committeemen and two Precinct Committeewomen.

Rule 11. *Delegate Selection Rules*

Section 1. All delegates and alternate delegates shall be elected subsequent to the State of Florida Presidential Preference Primary which is to be held on March 11, 1980, in accordance with the procedures set forth herein.

Section 2. The Republican presidential candidate receiving the higher or highest number of votes in any congressional district shall receive all delegate votes from such congressional district. The Republican presidential candidate receiving the higher or highest number of statewide votes shall receive all six (6) Delegates at Large.

Section 3. Or before March 19, 1980, each Republican presidential candidate whose name had been placed on the ballot shall submit to the State Party Chairman of the Florida Republican State Executive Committee a list of proposed delegates and alternate delegates from among each of the candidate's supporters who shall be considered as candidates with others to be elected as delegates and alternate delegates. The names and addresses of the

proposed candidate's supporters shall be distributed by the State Party Chairman to the various chairmen of the electing bodies prior to the holding of any elections for the purpose of electing delegates and alternate delegates.

Section 4. The Republican Party of Florida is entitled to elect fifty-one (51) delegates and fifty-one (51) alternate delegates to serve in such capacities at the Republican National Convention and these delegates and alternate delegates shall be elected in the following manner.

(a) A total of six (6) delegates and six (6) alternate delegates for the Republican Presidential candidate shall be elected as Delegates at Large by the Executive Board of the Republican State Committee at a duly called meeting on March 29, 1980.

(b) A total of forty-five (45) delegates and forty-five (45) alternate delegates shall be elected from the congressional districts, with three (3) delegates and three (3) alternate delegates to be elected from each congressional district. The three delegates and the three alternate delegates from each congressional district shall be elected by a majority vote of the total respective state committeemen, state committeewomen and county chairmen representing any county in each congressional district; the State Executive Committee Congressional Vice-Chairmen from each congressional district shall preside and chair in accordance with *Roberts Rules of Order*, Newly Revised, the said elections to be held by March 24, 1980, at a time and place to be set by the State Chairman. In the event of a tie, a winner shall be determined by lot.

Section 5. Notice to the registered Republican voters of the above-mentioned election dates, time, place, rules, officials conducting and eligibility requirements for participation in the said elections, shall be made available

for publication throughout Florida, not less than 15 days prior to the dates of said elections.

Section 6. Any candidate for delegate and alternate delegate shall be a registered Republican voter and to be a candidate for a delegate or alternate delegate from a congressional district, shall also reside in and be elected from the voter's congressional district. In addition, the candidate shall file a qualifying oath with the State Party Chairman on or before March 19, 1980. The qualification oath shall be prescribed by the State Party Chairman in accordance with the applicable statutes of Florida and the applicable rules promulgated by the Republican National Committee.

Section 7. No candidate for delegate or alternate delegate or the elected delegate or alternate delegate shall be required to pay an assessment or fee to become a candidate or to serve as the elected delegate or alternate delegate.

Section 8. No candidate for delegate or alternate delegate shall be discriminated against for reasons of sex, race, religion, color, and age or national origin and all delegates shall be divided equally according to gender as nearly as possible.

Section 9. The Chairmen of the various electing bodies shall certify on or before March 28, 1980, those names of the candidates elected as delegates and alternate delegates to the State Party Chairman who then shall prior to thirty (30) days before the time set for the meeting of the Republican National Committee, the elected delegates and alternate delegates. The delegates' and alternate delegates' qualification oaths, as required by Florida Statute 103.101 (6), shall be filed with the Secretary of State.

Section 10. The provisions of Chapter 103, Florida Statutes 1978, are hereby incorporated by reference and shall have such force and effect as if set forth in full herein. Any actions of the Florida Legislature to repeal or amend Chapter 103 after the date of adoption of this rule (May 5, 1979) shall have no effect on this rule unless specifically adopted by the Board.

Section 11. In the event a delegate or an alternate delegate is unable to attend the Republican National Convention, the State Chairman of the Republican Party shall select his or her replacement.

Section 12. A copy of this rule, as adopted, shall be filed with the Department of State within seven (7) days after its adoption.

RULE 12. *Election of State Committeemen and Women*

Each county shall elect one man and one woman to serve as State Committeeman and State Committeewoman from that county. In accordance with Section 103.091, Florida Statutes, State Committeemen and women shall be elected for 4 year terms at the Presidential preference primary election by registered Republican electors within their county. The election shall be determined by a plurality of the votes cast. The terms of those elected shall commence on the first day of the month following the Presidential preference primary election.

Electors seeking to qualify for such office shall do so with the Supervisor of Elections in their county not earlier than noon of the 63rd day or later than noon of the 49th day preceding the Presidential preference primary election.

FLORIDA STATUTES

104.011 False swearing.—Whoever willfully swears or affirms falsely to any oath or affirmation, or willfully procures another person to swear or affirm falsely to an oath or affirmation, in connection with or arising out of voting, registration, or elections is guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

104.41 Violations not otherwise provided for.—Any violation of this code not otherwise provided for is a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF FLORIDA
TALLAHASSEE DIVISION

TCA 80-734

NORMAN E. WYMBS and ANN CASSADY,
Plaintiffs,

v.

REPUBLICAN STATE EXECUTIVE COMMITTEE
OF FLORIDA,
Defendant.

MEMORANDUM OPINION

STAFFORD, C.J.

This action was originally brought in this Court in 1980. Plaintiffs, three members of the Republican State Executive Committee of Florida (hereinafter Executive Committee), allege violations of rights protected by fourteenth amendment to the United States Constitution and 42 U.S.C. § 1983. The complaint charged two counts: The Executive Committee did not proportionally represent Republican voters in Florida, and delegates to the Republican National Convention were selected and allocated in violation of the precepts of equal protection under the laws.

Pursuant to cross motions for summary judgment, this court issued the order of June 20, 1980, denying relief

on the count pertaining to the Executive Committee and granting the requested relief as to allocation of delegates to the Republican National Convention. Defendant took an appeal to the United States Circuit Court for the (then) Fifth Circuit. Plaintiffs, meanwhile, filed a Motion for Rehearing as to Count I (Document 28), which was granted by order of October 10, 1980, (Document 41). Subsequently, the Court of Appeals vacated and remanded for additional consideration those issues on appeal, *Wymbs v. Republican State Executive Committee*, 658 F.2d 324 (5th Cir. 1981), instructing this court to consider the applicability of *Democratic Party of the United States v. LaFollette*, 450 U.S. 107 (1981), to the facts and issue of the case at bar. The parties have submitted additional memoranda in support of their respective positions.

JUSTICIABILITY

Voting rights cases often present difficult questions, yet resolution of the problems can be judicially managed. *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Reynolds v. Simms*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); *Maxey v. Washington State Democratic Committee*, 319 F. Supp. 673 (W.D. Wash. 1970). Justiciability involves a preliminary determination that a court may scrutinize an allocation or election formula; it is not a decision on the merits. *See Bode v. National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); *State of Georgia v. National Democratic Party*, 447 F.2d 1271 (D.C. Cir.), *cert denied*, 404 U.S. 858 (1971). This court's obligation is to decide

> whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.

Baker v. Carr, 369 U.S. at 198.

In this case, plaintiffs assert that the Republican Party's rules violate a Republican voter's entitlement to have his vote counted once. *See Gray v. Sanders*, 372 U.S. 368 (1963). If a breach of voters' rights can be shown, questions of justiciability do not preclude this court from enforcing constitutional protections by granting declaratory and injunctive relief.

COUNT I

Functions of Executive Committee

In accordance with Florida law, each county in the state elects one man and one woman to a four-year term to serve on the Executive Committee. Florida Statutes § 103.091 and Rule 12 of the Republican Party of Florida Rules of Procedure (revised as of December 18, 1979) (hereinafter Florida Rules). The Executive Committee represents the Republican Party in Florida and is charged with various duties delineated in the Florida Rules and the Florida Statutes.

Initially, it must be observed that political parties in this country may operate in two distinctly different capacities. *See, e.g., Montano v. Lefkowitz*, 575 F.2d 378 (2d Cir. 1978); *Lynch v. Torquato*, 343 F.2d 370 (3rd Cir. 1965). A political party, in the traditional sense, is an association of individuals banded together for various purposes including the promotion and establishment of their political views and the election of individuals pledged to that end. As an association, a political party and its members

> enjoy a constitutionally protected right of political association. . . . Moreover, '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.'

Cousins v. Wigoda, 419 U.S. 477, 487 (1975) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)). In contrast, a political party may, as it assumes functions of government, become inextricably bound with the state. In election matters, if a party undertakes such duties that it becomes the surrogate of the state it becomes, in that capacity, public in nature. *See, e.g., Gray v. Sanders, supra.*

Plaintiffs' complaint alleges that the Executive Committee performs duties which are effectively state action and that the makeup of the Executive Committee and its voting procedures, which lack any mechansim for weighting votes proportionally to the number of Republicans registered in each county, deny individual Republicans equal protection under the law.[1] Plaintiffs ask the court to enjoin the Executive Committee from performing these public functions until the Executive Committee implements some method of proportional voting.[2]

The facts plaintiffs assert to show violation of a "one-registered-Republican, one-vote" standard[3] are not in dispute. Each county is entitled to two members on the Executive Committee regardless of the number of Republican Party members in the county. When votes are not weighted to reflect these differences in party strength among the counties, inequality of representation must result.[4]

COUNT II

The Delegate Allocation and Selection Process

Florida's scheme for electing a President begins with a Presidential Preference Primary in which each party member qualified to vote may select a candidate for nomination. Section 103.101(1), Florida Statutes. Republican

voters may vote only for Republican candidates. Section 101.021, Florida Statutes. At least ninety days prior to the primary election, the executive committee of each political party must establish procedures for selecting delegates and determine how many delegates and alternates to the national convention will be selected. Section 103.101 (5), Florida Statutes. Registered Republicans select fifty-one delegates and fifty-one delegate alternates. Three delegates are chosen from each of fifteen congressional districts, and six delegates at large are elected by the State Committee Board. Florida Rule 11, Section 4.[3] Two methods of delegate allocation are available under Section 103.101(8): (a) The candidate receiving the highest number of votes in a congressional district receives all the delegate votes from that district,[4] or (b) by rule, a party may allocate all delegates at the congressional district level and at large at the statewide level in the same proportion that the number of votes the candidate receives bears to the total number of votes cast for all of the party's candidates. The Florida Republican Party uses the "winner-take-all" method. Florida Rule 11, Section 2. Whichever method of allocation is employed, a delegate or delegate alternate must support the candidate he was selected to support until the candidate is nominated or receives less than 35% of the votes for nomination. Section 103.101 (6), Florida Statutes.

Count II attacks the rules adopted by the Executive Committee for the allocation and selection of delegates to the Republican National Convention. As discussed above, those rules provide for the selection of three delegates and three alternates on a winner-take-all basis from each of the congressional districts in Florida, regardless of the district's population. Florida Rule 11, Sections 2 and 4. Plaintiffs argue that such a plan denies them

equal protection because their districts, despite their significantly larger number of registered Republicans, can select no more delegates than districts with a much smaller population of Republican voters.[7] As substantial proof of those allegations, plaintiffs submit the uncontroverted affidavit of Dorothy Glisson, Director of the Division of Elections for the State of Florida. Those figures detail the Republicans registered in each congressional district: First - 32,782; Second - 22,655; Third - 18,936; Fourth - 72,369; Fifth - 142,536; Sixth - 153,294; Seventh - 39,759; Eighth - 90,873; Ninth - 88,430; Tenth - 168,248; Eleventh - 143,814; Twelfth - 94,659; Thirteenth - 37,543; Fourteenth - 36,931; Fifteenth - 60,180.

Plaintiffs maintain that this disparity in the number of registered Republican voters, when combined with the winner-take-all provision of Florida Rule 11, denies them equal protection of the Laws of Florida in violation of the fourteenth amendment to the United States constitution.

STATE ACTION

Plaintiffs ground their complaint on a denial of equal protection in violation of 42 U.S.C. § 1983. To sustain a cause of action under the statute, state action must be present in the challenged act. *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970). Problems in determining the degree of state involvement necessary to clothe the activity of an ostensibly private organization with the accountrements of the state have been considered in terms of (1) the relationship or nexus between state funding or state regulations and the challenged activity, (2) the extent of government control of the activity, and (3) the entity's performance of traditional government functions. *See Musso v. Suriano*, 586 F.2d 59 (7th Cir. 1978), *cert. denied*,

440 U.S. 971 (1979); *Developments in the Law - Elections*, 88 Harv. L. Rev. 1114, 1155-61 (1975).

In regard to the first two considerations, the Supreme Court has stated that state regulation "in any degree whatever" cannot amount to state action unless the state has "significantly involved itself with invidious discriminations" or otherwise enforced or sanctioned the private action. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972), citing from *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967). Even "extensive and detailed" regulation may not satisfy the state action requirement. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974).

> [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Id. 419 U.S. at 351, citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972).

In the context of voting rights, a state's collaboration in the election process through enforcement of party rules constitutes state action. *Gray v. Sanders.* Defendant attempts to distinguish *Gray* from the case at bar because primary elections rather than delegate selection procedures were at issue in *Gray*. Yet the bracket system of weighting votes by county units attacked in *Gray* resembles Florida's system for weighting votes by congressional districts in both form and substance for purposes of state action. Just as Georgia adopted the primary system "as a part of the public election machinery," *Gray v. Sanders*, 372 U.S. at 374, Florida adopts the Republican Party Rules for allocating delegates. The Executive Committee derives its authority to prescribe methods of electing delegates and alternates to national conventions from Section 103.091(2), Flor-

ida Statutes. Section 103.101(8) permits the party to determine how delegates are allocated. Any discrimination which results, then, from a party decision concerning election or allocation of delegates occurs with the state's approval. Further, Section 103.101(6) binds the delegates to vote according to the methods established. Thus, the "exclusions of voters made by the party by the [party] rules become exclusions enforced by the State." *Gray v. Sanders*, 372 U.S. at 374, citing from *Chapman v. King*, 154 F.2d 460, 464 (5th Cir. 1946).

The third approach to state action questions, the public function analysis, was spelled out clearly in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). There, a proposed sale of bailed goods under the terms of New York's Uniform Commercial Code did not constitute state action because the statute did not compel sale of the goods, nor was such a sale a sovereign function. Defendant asserts that the allegations of Count II do not constitute state action because Section 103.101(8) does not *compel* the Republican Party to use a three delegate per district allocation method. *See Waters v. St. Francis Hospital, Inc.*, 618 F.2d 1105 (5th Cir. 1980). Section 103.101(8) provides an alternative proportional allocation method. This assertion may be valid, but it completely ignores the second prong of the *Flagg Brothers* test for state action - whether the challenged action constitutes a traditionally exclusive sovereign function. *Flagg Brothers* makes it clear that elections, whether mandated by statute or not, are public functions. To clarify its holding the Court discussed elections as an example of a function which is "exclusively reserved to the State." 436 U.S. at 158. "[O]ur cases make it clear that the conduct of the elections themselves is an exclusively public function." *Id.* The public function doctrine encompasses elections regulated by the state as

well as elections "conducted by organizations which in practice produce 'the uncontested choice of public officials.'" *Id.*, at 158, citing *Terry v. Adams*, 345 U.S. 461, 484 (1953) (Clark, J., concurring). Exclusivity, the Court explained, is the key to the public function analysis. The settlement of disputes between creditors and debtors at issue in *Flagg Brothers* could be resolved by means other than remedies provided by the Uniform Commercial Code. Here, the only election possible is the one conducted through the state's election machinery and the election function is thus inclusive.

Plaintiffs list four specific functions which state law transfers to the Executive Committee and which are sufficiently imbued with state action to invoke equal protection considerations:

(1) adoption of Presidential Preference Primary rules, as authorized by Section 103.101, Florida Statutes;

(2) filling vacancies in nominations, as authorized by Section 100.111(6), Florida Statutes,

(3) nomination of presidential electors pursuant to Section 103.021(1), Florida Statutes; and

(4) collection and expenditure of the party assessment levied on candidates for public office pursuant to Section 99.092, Florida Statutes.

These four areas are, certainly, a part of the public election process in Florida and plaintiffs urge that they therefore fall within the general rule stated in *Flagg Brothers, Inc. v. Brooks, supra.*

However, merely being a part of the election process in which the state collaborates is insufficient to bring the activity judicial scrutiny in an action brought under 42 U.S.C. § 1983. As Justice Rehnquist noted in *Flagg Brothers.*

> Although the rationale of these cases [labeling conduct of elections an exclusively public function] may be subject to some dispute, their scope is carefully defined. The doctrine does not reach to all forms of private political activity, but encompasses only state regulated elections or elections conducted by organizations which *in practice produce 'the uncontested choice of public officials.'*

436 U.S. at 158 (footnote omitted; emphasis added).

All political activity, whether private or public, directly affects the party's role in conducting elections. The issue now before the court is whether the four activities plaintiffs list do, in fact, ultimately produce the uncontested choice of public officials; that is, are these activities an "integral part of the election process [which] must pass muster against the charges of . . . abridgment of the right to vote." *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969).

The rules by which the Presidential Preference Primary is governed clearly affect access to the ballot and the ultimate result of the election. Party rules affecting primary elections in other states have been subject to equal protection challenges heretofore. *See Gray v. Sanders, supra* (unequal weighting of county primary results); *Moore v. Ogilvie, supra* (party requirement of geographical support for potential candidates). Party rules shape the field of choices from which the party's candidate will emerge and the method by which the field will be narrowed. As such, the rules are the first step in the process which ultimately produces the uncontested choice of public officials. This rule-making activity is among those "proceedings intimately connected with the progression of the elective process" which "[t]he Equal Protection Clause . . . embraces within its protection." *Bode v. National Democratic Party*, 452 F.2d 1302, 1306 (D.C. Cir. 1971).

The power of the Executive Committee to fill vacancies in nomination on the party ballot, though rarely exercised, directly affects the ultimate political choice. Although dealing with a county, rather than a state, committee, *Seergy v. Kings County Republican Committee*, 459 F.2d 308 (2d Cir. 1972) is directly on point. The court agrees with that opinion:

> In those rare instances where the committeemen perform public electoral functions (e.g., the nomination of candidates to fill vacancies or to run in special elections, or the giving of consent to candidacies by non-members of the party), however, the county committee is required by the Equal Protection Clause to apply the "one-man, one-vote" principle, since in such cases it is playing an integral part in the state scheme of public elections.

Id. at 314.

The filling of vacancies in nomination by the Executive Committee is clearly an integral part of the election process.

In contrast, the other two activities asserted by plaintiffs as requiring judicial enforcement of equal protection are, at best, tangentially and administratively related to the outcome of the election process.

The appointment of presidential electors is a power granted to the state legislatures by the United States Constitution, article II, section 1 and 3 U.S.C. §§ 1-6. *See also McPherson v. Black*, 146 U.S. 1 (1892). Florida Statute § 103.021(1) provides that the Governor shall appoint as electors only those people who are nominated by each party's executive committee. Furthermore, the statute provides that the electors shall take an oath to vote for the candidate of the party which nominates them. Florida

Statute § 103.011 provides that those electors representing the party whose presidential and vice-presidential candidates receive the highest number of votes will be elected. The names of the individual electors do not appear on the ballot; the electors have no discretionary duties. The electors themselves in no way affect the process by which the election results are determined. Thus, the electors themselves are administrative tools only, and their nomination is not within the limited scope delineated in *Flagg Brothers, supra* and *Moore, supra*.

Plaintiffs also urge that the Executive Committee be enjoined from levying and spending the party assessment authorized by Florida Statutes § 99.092. Such party assessments have heretofore withstood constitutional attacks mounted pursuant to 42 U.S.C. § 1983. *Adams v. Askew*, 511 F.2d 700 (5th Cir. 1975); *Wetherington v. Adams*, 406 F.2d 724 (5th Cir. 1969). Plaintiffs fail to allege facts sufficient to support a finding that the activity of collecting and spending these funds in and of itself produces the "uncontested choice of public officials." Furthermore, the fiscal management of a political party is so intertwined with the party's private political functions that the court could not interfere without violating constitutionally protected freedoms necessary to the preservation of our political system.

Plaintiffs, in their Memorandum of Law on Rehearing (Document 42) state that although the complaint lists only the four activities discussed above, these are not the only areas of state-party collaboration subject to equal protection considerations. It is not the purpose or function of this court to second guess the Executive Committee, nor is this court able to enjoin activities of a class whose parameters are at best arguable. Should plaintiffs feel the Executive Committee undertakes particular activities

or adopts specific policies which fall within the narrow scope of election activities which are sufficiently public to invoke equal protection, some court will be open to them for appropriate action.

This court does find that equal protection considerations are appropriate in the adoption of rules for presidential preference primaries and in the filling of vacancies in nomination. For the reasons discussed in Count II, *infra*, the court finds that the present procedures of the Executive Committee are violative of equal protection and will grant the requested injunctive relief as to those specific activities.

Equal Protection

Plaintiffs have shown that Florida's system of allocating delegates to the Republican Party's national convention results in disparity of voting strengths among the fifteen Congressional districts from which Florida's delegates are chosen. The number of registered Republicans varies significantly between congressional districts, yet each district is allotted three delegates. The voting strength of the Republicans in the more populous districts is less than that of Republicans in the sparsely populated districts. For example, the 18,936 Republicans in the Third District have seven and a half times the voting strength of the Republicans in the Eleventh District, which currently contains 143,814 registered Republicans.[8] The inequality of voting strength increases when the delegates cast votes at the Republican National Convention. The candidate receiving the highest number of votes in each district receives the vote of all three delegates from that district. A Republican presidential candidate in the Third District, for instance, might receive 12,000 votes. If that number represented the highest number of votes for the district,

all three delegates from the Third District would be obligated to vote for that candidate at the national convention. As a result, 6,936 votes would have no weight.

The Supreme Court has determined that constitutionally granted voting rights "must be recognized in any preliminary election that in fact *determines the true weight a vote will have*." *Gray v. Sanders*, 372 U.S. at 380 (emphasis supplied). The constitutionality of an election system, whether it be a county unit system employed to elect a United States Senator and state officers, as in *Gray*, or a delegate apportionment by congressional district system used to nominate a President, as in the case at bar, depends on the effect of the system as a whole on the one man, one vote standard. The Equal Protection Clause of the fourteenth Amendment requires that

> [o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . . wherever their home may be in that geographical unit.

Id. 372 at 379. The Georgia system at issue in *Gray* provided for a statewide primary election. Each county was allotted a specific number of units determined by a "bracket system" based on population. A winner-take-all method of counting votes allowed the candidate winning the popular vote in a county to receive the entire unit vote of the county. Even though each voter in the state exercised his entitlement to one vote in the statewide primary, the method of tabulating those votes resulted in weighting the votes cast in a sparsely inhabited county more heavily than the votes in a more populous county.

The facts in this case are apposite. Because Rule 11, Section 2 of the Florida Rules provides that a district's winning Republican candidate receives all three delegate

votes, the vote of persons residing in the Eleventh District is of less impact than that of voters in the Third District. This method of weighting votes denies equal protection.

> If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. *See Terry v. Adams*, 345 U.S. 461, 97 L.Ed. 1152, 73 S.Ct. 809. How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in the smallest rural county?

Gray v. Sanders, 372 U.S. at 379.

Gray did not rule on the application of the one man, one vote standard to a convention, as opposed to primary, system for nominating candidates for office. In this case defendant asserts that applying the *Gray* standard to the Florida system for electing Presidential candidates would infringe upon the first amendment right to freedom of association enjoyed by private organizations. Defendant relies heavily upon *Ripon Society v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), a case involving a challenge to a percentage formula used to select and apportion delegates from the various states to the 1972 Republican National Convention. In holding that the formula did not violate equal protection, the Court stated that "voting rights are not as heavily implicated in a nomination as in an election." 525 F.2d at 588-89. Under the Florida system, however, the method of allocating delegates directly impacts on the exercise of voting rights at the primary election. All three delegates from a district must support the candidate winning the most votes in the district until the candidate is nominated or receives

less than 35% of the votes for nomination at the national convention. The disparity of Florida's system impacts on the voting rights of a clearly identifiable class of persons - registered Republicans in the State of Florida. Even though each registered Republican may cast a vote in Florida's primary election, the one man, one vote standard is violated because the Republican Party Rules give some of those votes more weight than others. This weighting procedure parallels the procedure struck down in *Gray*.[10]

Plaintiffs in this case are attacking party rules which dilute the vote of party members; the internal administrative affairs of the party itself are not under scrutiny.

> Decisions made within the party apparatus to accord more weight to some counties than to others are not mere administrative decisions which can legitimately be taken out of the hands of the voters.

Maxey v. Washington State Democratic Committee, 319 F.Supp. at 680. The Republican Party of Florida, by Rule 11, has determined that votes shall not be equally weighted. Section 4(b) of that rule requires that three delegates be elected from each district, and Section 2 gives the winning candidate the entire delegate vote for the district. The Florida Statutes do not require the Republican Party to select three delegates from each district. Section 103.101 (8) Florida Statutes, provides that the party may choose to allocate delegates on either a winner-take-all basis or in proportion to the number of votes a candidate receives in the district.[11] Defendant's affidavits (Document 15) assert that the rules were designed to further legitimate party interests in

> achieving the broadest possible representation and participation in the party's selection of a nominee . . . and achieving the broadest possible representation and

participation in the other internal party decision making tasks undertaken by delegates to the National Party's convention.[12]

Where other methods are available to promote party goals, legitimate party interests cannot legally be served by a weighting system which directly impacts on voting rights. *Redfearn v. Delaware Republican State Committee*, 362 F. Supp. 65 (D. Del. 1973), *rev'd* 502 F.2d 1123 (1974), *modified in part*, 383 F. Supp. 372 (1975); *Maxey v. Washington State Democratic Committee*; *Developments in the Law - Elections*, *supra*, at 1182-94.

In support of their argument that the provisions of Rule 11 are internal political decisions not to be disturbed by the court, defendants cite several distinguishable cases. Two Supreme Court cases, *Cousins v. Wigoda*, *supra*, and *O'Brien v. Brown*, 409 U.S. 1 (1972), considered a political party's power to pass on the qualifications and credentials of delegates. The impact of delegate allocation procedures on voting rights was not at issue in either case.[13] In *Cousins*, the Democratic Committee seated delegates of its own choosing ("Cousins delegates") rather than delegates elected in a Illinois primary election ("Wigoda delegates") at the 1972 Democratic National Convention. The Court held that the committee should not be enjoined from seating the Cousins delegates, because the Democratic Party's interest in determining the qualifications and eligibility of delegates was superior to the state's interest in setting up qualifications. *O'Brien* also involved an intra-party dispute over the seating of delegates. The Credentials Committee of the 1972 Democratic National Convention recommended unseating Illinois and California delegates allegedly elected in violation of party rules. The Supreme Court stayed a judgment of the Court of Appeals, which sustained the unseating of Illinois delegates and

held the seating of the California delegates unconstitutional, pending disposition of the petitions for certiorari. The Court noted that the problem could be resolved by the party at the convention itself, so that "grave doubts" about the constitutionality of the Court of Appeals' intervention in internal party affairs of this nature existed. 409 U.S. at 5.

Defendant argues that the holding in *Bode v. National Democratic Party, supra*, supports the Florida Republican Party's delegate allocation system. The District of Columbia Court of Appeals ruled that the Equal Protection Clause does not mandate delegate allocation on the basis of "party strength," i.e., in proportion to the number of Democrats voting in a state in one or more preceding elections. Representation at the national convention based on past voting performance might inadequately represent the constituency, composed of the entire electorate, since a voter's allegiance to nominees might change from year to year. Nor could prior voting patterns accurately predict how many members of the current population would vote Democratic. Plaintiffs in this case do not even suggest that apportionment be based on past Republican Party strength in Florida. Furthermore, the *Bode* court distinguished the facts of *Bode* from cases involving dilution of the franchise.

> In such cases not only is there a clear correlation between the citizen's vote and the procedure being challenged, but those entitled to representation are, under any of several constitutional definitions of population, readily ascertainable.

452 F.2d at 1306 (footnote omitted).

The correlation between the vote of a registered Republican in Florida and the weighting procedure of the Republican

Party in this case is clear - the rules directly reduce the strength of the vote. Republicans registered to vote in Florida for the current year comprise a "readily ascertainable" class of voters "entitled to representation."[14] Florida's Republican delegates cannot represent the entire electorate because the Florida Statutes bind each delegate to support the Republican candidate he or she was selected to support.

Nor does *Lynch v. Torquato, supra,* described by defendant as "almost a clone" to this case, lend credence to the position that the challenged procedures constitute internal management affairs. The *Lynch* plaintiffs complained that precinct unit voting in Cambria County, Pennsylvania, denied equal protection to registered Democratic voters in electing a Democratic County Committee and County Chairman. The precincts of Cambria County contained disparate numbers of registered Democrats, ranging in the extreme from 750 to 18 voters. The court, in considering the purely administrative functions normally performed by the county party officials,[15] denied the plaintiffs' request for application of a one man, one vote standard to the elections. In the event of a sudden vacancy in a nomination for county governmental office, the party's County Chairman selected a substitute candidate on behalf of the party. Plaintiffs' failure to specifically challenge the emergency method of nominee selection resulted in the court's refusal to decide its constitutionality. However, the court commented:

> Whether the equalitarian requirement of the Fourteenth Amendment extends to procedural alternatives of primary elections, and particularly to such post-primary emergency nominations as we have here, may well be doubted. But we need not and do not decide these questions.

343 F.2d at 372 (footnote omitted). The court continued in a footnote:

> The question at what stage popular choice must rule in the process of selecting public officials is a difficult one with far reaching implications. Indeed, choice of delegates to party national conventions for the nomination of candidates for President and Vice President would seem logically to be covered by the plaintiffs' view of the reach of the equal protection clause.

343 F.2d at 372, n.5. The party procedure challenged in this case, then, is the type which the *Lynch* court referred to as "procedural alternatives of primary elections" rather than the administrative procedures held not to require application of the *Gray* principle. *Lynch* was distinguished on the same grounds in *Maxey v. Washington State Democratic Committee*, 319 F. Supp. at 680.

The Applicability of Democratic Party of the United States v. LaFollette

In its order of vacation and remand, the Fifth Circuit Court of Appeals instructed this court to consider the applicability of the then-recent Supreme Court decision of *Democratic Party of the United States v. LaFollette*, 450 U.S. 107 (1981), and the effect of any intervening events the parties should deem pertinent. Noting that the facts of *LaFollette* were readily distinguishable from the facts of the case at bar, *Wymbs*, 658 F.2d at 325, the circuit court recommended consideration of certain "broad language to the effect that '[a] political party's choice among various ways of determining the makeup of a state's delegation to the party's national convention is protected by the Constitution.'" *Id.* quoting *LaFollette*, 450 U.S. at 124.

While this language is broad, indeed, it must be interpreted in the context of the articulated issue before the court and the analytical approach to that issue. "The issue is whether the State may compel the National Party to seat a delegation chosen in a way which violates the rules of the Party." 450 U.S. at 121. The court held that the issue had already been decided by *Cousins v. Wigoda*, a case which dealt solely with first amendment freedom of association in the context of a party's right to determine qualifications of delegates. The Court in *LaFollette* used the same analytical framework, balancing the party's constitutional rights against the state's articulated purpose to encourage voter participation.

The issue before this court is qualitatively different. Here, there is no attack on the freedom of association rights of the national party nor of the *method* of selection of the delegates. Rather, this court is asked to weigh the constitutionally guaranteed rights of the individual voter to have a meaningful voice in the electoral process against the Executive Committee's rule-making authority. *Baker v. Carr, supra; Terry v. Adams, supra.* The Republican State Executive Committee has advanced no argument, compelling or otherwise, to counterbalance the voter's entitlement to equal protection under the laws.

Defendant in its District Court Memorandum Following the Court of Appeals Remand and Vacated Judgment Below (Document 55) urges the court to consider the effect of a change in Rule 18(a) passed in 1980 which deleted language compelling delegates to vote in accordance with the results of binding primaries or oaths required by state statute. Defendant argues that this change reasserts the party's first amendment rights and supersedes any state requirement for representative voting. The language of the current rule 18(a) does not neces-

itate that interpretation. There is nothing in the rule as it now reads which would *prohibit* the state or the state Executive Committee from requiring a binding oath. This interpretation is supported by the Florida Rules, as revised as of May 15, 1982, *after* the national rule change. Rule 11, section 6 requires delegates to file a qualifying oath "in accordance with the applicable statutes of Florida." Florida Statutes § 103.101(6) requires the candidate pledge his vote to the candidate he was selected to support until such time as that candidate receives less than thirty-five percent of the convention vote. Defendant surely does not contend that delegates would lightly disregard such an oath.

The court, therefore, finds nothing in either *LaFollette* or the subsequent national party rule change which would change its previous ruling as to Count II.[16] An appropriate order will issue.

FOOTNOTES FOLLOW.

/s/ William Stafford
William Stafford
Chief Judge

FOOTNOTES

1. The Republican Party of Florida Party Rules of Procedure (revised as of December 18, 1979) make one provision for proportional voting. Rule 5(b), relating to vacancies in nominations for a district office, provides that a quorum of members of the Executive Committee and county chairmen from counties within the district may vote on a replacement nominee

> which vote shall be cast proportionally to each county's percentage of total party registration within the election district and allocated equally to each voting member present, providing that no county's total vote shall exceed the allocated percentage for the county.

No such provision is made in voting to fill vacancies in nominations for state offices. Rule 5(c).

2. Defendant represented in its Supplemental Memorandum of Law in Response to Plaintiffs' Motion for Rehearing as to Count I (Document 45) that the Executive Committee would be considering, in March, 1981, a rule change which "would provide . . . for county Republican registration weighted voting within the State Executive Committee on all prospective state and federal office nominee-vacancy-filling questions." (Document 45 at 9). No such change is included in the May 15, 1982, revision of the Florida Rules.

3. In the body of plaintiffs' complaint, they had argued for a one-registered-Republican, one-vote standard, while their prayer for relief petitions this court to apply a one-man, one-vote rule. Plaintiffs' motion for summary judgment (Document 17) at page 12, states that the one registered Republican-one vote principle is to be determinative in this case.

4. See Affidavit of Dorothy Glission, Director of the Division of Elections for the State of Florida (Document 17, Exhibit A), and discussion as to Count Two, infra.

5. Plaintiffs Wymbs and Cassady reside and vote in the Eleventh Congressional District. Plaintiff Moss resides and votes in the Twelfth Congressional District.

6. The State Executive Committee may elect no more than 25 percent of the total number of delegates. Section 103.101(5), Florida Statutes.

7. The candidate receiving the highest number of statewide votes receives the votes of all six delegates at large. Section 103.101(8)(a), Florida Statutes; Rule 11, Section 2, Florida Rules. Plaintiffs do not challenge the procedure for selecting delegates at large.

8. Affidavit of Dorothy Glission, Director of the Division of Elections for the State of Florida. (Document 17, Exhibit A.)

These figures based on a compilation as of February 9, 1980, are more current than the figures set out in Exhibit G of the complaint, which were based on a compilation as of October 7, 1979.

9. The Court stated:

> We do not reach here the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system.

372 U.S. at 378, n.10.

10. The Ripon court conceded that Gray v. Sanders "is clearly the Supreme Court case most closely in point," but then distinguished Gray because the district court ruling in Gray noted that Georgia was dominated by one party rule. 525 F.2d at 589, n.65. In effect, there was "only one party with a realistic chance to win the election" in Georgia, and a vote cast in the nominating process was "the only effective vote that [could] be cast." Id. 525 F.2d at 589. Yet nowhere in Gray does the Supreme Court even mention the domination of the Democratic Party in Georgia.

The Ripon court also considered that delegate selection in other states may be conducted at party caucuses or by other methods which may be malapportioned or which offer almost no voter participation. The court reasoned that equal apportionment would, therefore, not always insure equal representation. In Florida, however, voters cast ballots at a primary. Equal protection requires that each voter be given equal treatment. Once the state establishes geographical areas of representation in an election, see Florida Statutes § 103.101(8), the votes cast within each of those areas must be given equal weight. See Gray v. Sanders, 372 U.S. at 379; Maxey v. Washington State Democratic Committee, 319 F.Supp. at 679.

11. Plaintiffs do not challenge the constitutionality of Section 103.101(8), Florida Statutes, nor does this decision determine the constitutionality of that section.

12. Defendant submitted two affidavits in support of its motion for summary judgment. The statement quoted above is contained in paragraph 7 of Exhibit "B", the affidavit of William E. Brock, Chairman of the Republican National Committee. Exhibit "A", a second affidavit by Bill Taylor, Chairman of the State Executive Committee of the Republican Party of Florida, states in Paragraph Five:

> The goals of the party are, among others, to promote Republican ideals, develop membership, and to elect Republican officials in every county in the state. To do so, every county must be given a meaningful voice in the Party decision making process.

13. The Supreme Court emphasized in Cousins:

> There are not before us in this case, and we intimate no views upon the merits of, such questions as: . . . (2) whether national political parties are subject to the principles of reapportionment decisions, or other constitutional restraints, in their methods of delegate selection and allocation.

419 U.S. at 483 n.4.

14. A case which held population alone to be an inappropriate basis for apportionment of delegates to national conventions recognized that delegates do not represent the entire population of the appropriate geographical area. Instead, the delegate's so-called constituency consists of voters within the geographical area who are members of the delegate's political party. See State of Georgia v. National Democratic Party, 447 F.2d at 1279.

15. The functions performed by the County Committee included raising and spending money, planning and directing campaigns, winning new members, encouraging voter registration, and administering political patronage.

16. Further, the court judicially notices that the Florida Legislature has accomplished congressional redistricting in 1982 to create 19 districts from the former 15. While there will invariably be some changes in party registration in the several districts, the principles of law applicable to this case will not be affected by such changes.

OPINION OF THE UNITED STATES COURT OF APPEALS

[Opinion Pages 495 to 518]
[495]

Norman E. WYMBS and Ann R. Cassady,
Plaintiffs-Appellees,
v.
REPUBLICAN STATE EXECUTIVE COMMITTEE OF FLORIDA,
Defendant-Appellant.

No. 82-6066.

United States Court of Appeals,
Eleventh Circuit.

Oct. 31, 1983.

Suit was brought challenging national political party's local rule governing selection of delegates to national convention. After remand, 658 F.2d 324, the United States District Court for the Northern District of Florida, William Stafford, Chief Judge, entered judgment striking down rule as violative of the equal protection clause of the Fourteenth Amendment and also ordering party's state executive committee to refrain from conducting certain statutorily mandated functions until committee weighted its voting on the one registered party member-one vote standard. On appeal, the Court of Appeals, Tjoflat, Circuit Judge, held that constitutionality of local party's convention delegate selection rule was nonjusticiable.

Reversed.

1. Federal Courts (Key) 5

An Article III court is one of limited jurisdiction and may not pass on abstract questions of political power, of sovereignty, or of government, nor may it proceed in face of a lack of satisfactory criteria for a judicial determination. U.S.C.A. Const. Art. 3, § 1 et seq.

2. Constitutional Law (Key) 68(1)

In order to proceed in a political question case, a court must determine whether duty asserted can be judicially identified and its breach judicially determined, and whether protection to the right asserted can be judicially molded. U.S.C.A. Const. Art. 3, § 1 et seq.

3. Federal Civil Procedure (Key) 241

In making determination as to whether a person should be joined to a suit, a court should be guided by pragmatic concerns, especially effect on parties and litigation. Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

4. Federal Courts (Key) 623

An appellate court may address joinder issues sua sponte. Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

5. Federal Courts (Key) 13

Controversy over constitutionality of local political party's national convention delegates selection rule was nonjusticiable in view of problem of whether party's national committee was a necessary and indispensable party to proceeding, since local rule was patterned on national committee rule, and would have to be joined, and, if so, whether joinder would have any effect since party's national convention determined which delegates were seated,

and in view of potential for serious infringement of party's First Amendment political association rights and of Article III limitations on [496] district court's jurisdiction over political questions. U.S.C.A. Const. Art. 3, § 1 et seq.; Amend. 1; Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

6. Federal Civil Procedure (Key) 2391

Article III courts must follow the firm and unvarying practice of constitutional courts to render no judgments not binding and conclusive. U.S.C.A. Const. Art. 3, § 1 et seq.

7. Federal Courts (Key) 12

For relief in federal courts, a hypothetical threat is not enough.

8. Federal Courts (Key) 13

Issue of whether national political party's state executive committee performed important political and governmental functions in selection of delegates to party's national convention that amounted to state action, and whether in performing such functions committee violated equal protection of the law, was nonjusticiable in view of unripeness of issue, practical impossibility of weighting selection on a "one registered party member-one vote" principle, and fact that state statute in plain terms proscribed weighting. West's F.S.A. § 103.091(6)(a).

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and SIMPSON, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

This appeal addresses the power of a federal district court (1) to reorder the manner in which the Florida Republican Party selects delegates to the Republican National Convention and (2) to control how the Party's State Executive Committee conducts its voting when carrying out functions required of it by Florida law. The district court struck down as violative of the equal protection clause of the fourteenth amendment the rule of the Florida Republican Party that governs the selection of delegates to the national convention. The court also ordered the State Executive Committee to refrain from conducting certain statutorily mandated functions until the Committee weighted its voting on a one Republican, one vote standard. We hold that article III of the Constitution does not permit a federal court to entertain the claims that were presented to the district court in this case. Accordingly, we reverse.

I.

Norman E. Wymbs, Ann R. Cassady, and Jack L. Moss (collectively referred to as "Wymbs") brought this suit, in two counts, in the United States District Court for the Northern District of Florida on January 31, 1980.[1] Wymbs and Cassady are registered Republicans and residents of Palm Beach County, Florida. Moss is a registered Republican and resident of Broward County, Florida. Wymbs named as sole defendant [497] the Republican State Executive Committee of Florida (the Committee).[2] Wymbs

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1. Moss was not named as a plaintiff in the original complaint but was joined as a plaintiff later.

2. Wymbs' complaint did not allege that the State Executive Committee was an entity capable of being sued. The Florida

(Continued on following page)

alleged in count one that the Committee performs a number of important political and governmental functions that amount to state action: (1) the adoption of presidential preference primary rules, as authorized by Fla.Stat.Ann. § 103.101; (2) the nomination of presidential electors, pursuant to Fla.Stat.Ann. § 103.021(1); (3) the filling of vacancies in nominations, as authorized by Fla.Stat.Ann. § 100.111; and (4) the collection of party assessments from candidates, as provided in Fla.Stat.Ann. § 99.092. Wymbs alleged that when the Committee carries out these four "governmental functions" it violates his fourteenth amendment right to equal protection of the law.[3] Wymbs maintained that Palm Beach and Broward County Republicans, who numbered 96,368 and 154,624, respectively, received the same representation (two seats) on the Committee as did Liberty and Dixie County Republicans, who counted as their number 21 and 29, respectively.[4] Wymbs sought to end this disparity.

Wymbs did not request the district court to reform the Committee's membership, but, instead, to enjoin the

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Footnote continued—

statute outlining "Powers and duties of executive committees" does not speak to the matter. *See* Fla.Stat.Ann. § 103.121 (1982). The Committee answered Wymbs' complaint, however, without qualification, and therefore we do not pursue this issue.

3. Wymbs also sought relief under 42 U.S.C. § 1983 (1976). His reference in the complaint to § 1983 consisted merely of a one sentence averment in each count. In count one he stated that the action "arises under the Fourteenth Amendment to the United States Constitution and U.S.C. Title 42, § 1983." Count two alleged that the defendant "violated U.S.C., Title 28 [sic], § 1983." The district court, in its memorandum opinions and dispositive injunctive orders, made only passing reference to § 1983 and did not analyze Wymbs' claims under that section. Nevertheless, we construe the court's action as having granted Wymbs relief on his § 1983 claim in each count of his complaint.

4. These figures are for December 1979, the month before this suit was filed.

Committee from voting on the above four matters until it adopted a weighted, proportional voting system. Thus, when voting only on these four matters the weight of the Committee members' votes would vary depending upon the number of registered Republicans in their counties. Although the Committee has, for many years, been required by state statutes to conduct these four activities, and full relief in this case would therefore impinge upon these laws, neither the State nor the state officer responsible for enforcing these statutes was made a party to this suit.[5]

In count two of his complaint, Wymbs sought to overturn Rule 11(4)(b) of the *Republican Party of Florida Party Rules of Procedure* (Rev.1979), which required that three delegates and three alternates to the 1980 Republican National Convention be chosen from each congressional district in Florida irrespective of the number of registered Republicans in the district. As in count one, Wymbs alleged that this delegate selection rule denied Florida Republicans equal protection of the law.[6] Although rule 11(4)(b) was simply part of the state party's version of Republican National [498] Party Rules 30 and 31, which were binding on every state Republican party in the nation, the Republican National Committee was not made a party to this suit. Because state rule 11 is based on national party rules which will govern the selec-

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5. Fla.Stat.Ann. § 86.091 requires that "[if a state] statute, charter, ordinance or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard." *Id.* (1983 Supp.). Neither officer was served with process or accorded a hearing in this case.

6. *See supra* note 3.

tion of delegates to the 1984 convention, Wymbs' count two claim is not moot.[7]

On cross-motions for summary judgment the district court sustained Wymbs' attack on the selection of Republican National Convention delegates by congressional district. The district court agreed with Wymbs that even though the federal Constitution[8] commands that each congressional district contain nearly the same number of people, it is not equality of population but, instead, equality of party registration that counts in determining the constitutionality of the apportionment of a state's delegation to a national political party convention. The district court therefore held that each delegate district must contain an equal number of registered Republicans and, on July 1, 1980, enjoined the Committee from implementing rule 11(4)(b). The court stayed its injunctive order until after the 1980 Republican National Convention and the

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7. Between quadrennial national conventions, the Republican National Committee is the embodiment and manager of the affairs of the Republican National Party. During the Republican National Convention, the convention itself is the Party. It conducts all of its own business, including the resolution of credentials disputes, and sets the rules and platform upon which the Republican National Committee will act until the next quadrennial convention. The rules of the Florida Republican Party for the selection of delegates from Florida to the 1984 Republican National Convention are based on the rules for the 1984 National Convention, as adopted by the 1980 National Convention. At the time this suit was brought the dispositive provisions of National Rules 30 and 31 were identical to their present form. Thus, Wymbs' count two attack on Florida rule 11(4)(b) is not moot. State rule 11(4)(b) is the vehicle through which Florida Republicans hope to seat delegates at the 1984 convention. The Republican National Committee has the responsibility for enforcing these rules between conventions and for issuing the call to the 1984 convention that will prescribe formally how delegates are to be selected in conformity with those rules. The Republican National Committee appears as amicus curiae in this case for the purposes of this appeal.

8. *See, e.g., Hadley v. Junior College Dist.*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

Committee immediately took an appeal to the former Fifth Circuit Court of Appeals.

The district court then disposed of count one of the complaint. The court sustained the constitutionality of the Committee's right to have two members from each county, each having an equal vote, and to conduct the business that Wymbs challenged. The court held that even if Committee conduct were subject to equal protection principles, the Committee's composition and the allocation of one vote to each member were not constitutionally deficient. The court therefore dismissed count one. Wymbs moved for a rehearing, and the court asked for further briefing on this constitutional question.

While the appeal on count two was pending in the Fifth Circuit,[9] the United States Supreme Court held that the Democratic National Convention had a constitutional right to refuse to seat a delegation from Wisconsin that was elected under a state [499] law at odds with party rules. *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981). The Fifth Circuit thereafter vacated the district court's injunctive order and remanded the case for reconsideration in light of *LaFollette*. *Wymbs v. Republican State Executive Committee*, 658 F.2d 324, 325 (5th Cir. Unit B 1981) (per curiam). The court considered *LaFollette* "of potential significance . . . deserv[ing] careful scrutiny and argument," and observed that

> Although the factual context and issues presented in *LaFollette* does not precisely coincide with those here,

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9. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of former Fifth Circuit handed down before October 1, 1981); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982) (adopting as binding all decisions of Unit B of Former Fifth Circuit handed down after Sept. 30, 1981).

> the Court used broad language to the effect that "[a] political party's choice among the various ways of determining the makeup of a state's delegation to the party's national convention is protected by the Constitution."

Wymbs, 658 F.2d at 325, quoting *LaFollette*, 450 U.S. at 124, 101 S.Ct. at 1020. The court also questioned the justiciability of Wymbs' equal protection claim and drew the litigants' attention to the *LaFollette* footnote which referred to *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C.Cir.1975) (en banc), *cert. denied*, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976), where the Court of Appeals for the District of Columbia Circuit upheld Republican National Party Rule 30, upon which rule 11(4)(b), the delegate selection rule Wymbs challenged, was based. *Id.*

On remand, the district court, in a memorandum opinion, again held rule 11(4)(b) unconstitutional, observing that nothing in *LaFollette* or the Fifth Circuit's opinion remanding the case should cause it to change its previous decision. The district court concluded that Wymbs' equal protection attack on rule 11(4)(b) was not an attack on the first amendment rights of the national party or on that party's method of selecting delegates; rather, it was strictly an attempt to enforce the "one person, one vote" right which Wymbs claimed was guaranteed Florida Republicans under *Gray v. Sanders*,[10] 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963).

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10. The district court relied heavily upon *Gray*, a reapportionment case involving one-party rule in Georgia. See *infra* note 29. The court also gave heavy emphasis to *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), a pure reapportionment case, and *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), a case involving invidious racial discrimination.

At the time the district court considered count two on remand, it reconsidered Wymbs' count one challenge that giving each county representative on the Committee one vote violated the equal protection clause. The court reversed its earlier ruling rejecting Wymbs' challenge, and found that two of the Committee's statutory functions—the promulgation of rules for the presidential preference primary and the filling of vacancies in nominations for statewide races—amounted to state action and, if performed when each county representative had one vote, would violate equal protection. The district court enjoined the Committee from performing these two functions until it implemented a voting procedure that ensured that each county representative on the Committee represented an equal number of Republican voters. In effect, the district court extended the "one person, one vote" principle of *Gray v. Sanders*[11] into a "one registered Republican, [500] one vote" principle, applicable to purely intra-party rules and affairs.

We are now presented with final judgments on both counts of Wymbs' complaint.[12] On count one, the district court granted Wymbs partial relief; on count two relief in full. The court founded all relief on the equal protection clause of the fourteenth amendment.[13]

[1, 2] Before proceeding to the merits of the Committee's appeal, we need to stress that apportionment, voting rights and political cases present difficult issues

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11. 372 U.S. at 378-81, 83 S.Ct. at 807-9; *see also Hadley v. Junior College Dist.*, 397 U.S. at 52-53, 90 S.Ct. at 793 (1970) (citing cases).

12. Our jurisdiction to entertain this appeal is thus conferred by 28 U.S.C. § 1291 (1976).

13. The court also granted relief under 42 U.S.C. § 1983 (1976 & Supp. V 1981). *See supra* note 3. In this appeal we treat relief under § 1983 and the equal protection clause as one and the same. For reasons we set forth in the text *infra*, Wymbs has no claim under either provision.

of justiciability, and of state action. Political squabbles are not as easily resolved in federal courts as are some other disputes. *See Baker v. Carr*, 369 U.S. 186, 281-85, 82 S.Ct. 691, 745-747, 7 L.Ed.2d 663 (1962) (Frankfurter, J., dissenting). An article III court is one of limited jurisdiction and may not pass on "abstract questions of political power, of sovereignty, of government," *Massachusetts v. Mellon*, 262 U.S. 447, 485, 43 S.Ct. 597, 600, 67 L.Ed. 1078 (1922); nor may it proceed in the face of a "lack of satisfactory criteria for a judicial determination." *Baker v. Carr*, 369 U.S. at 283, 82 S.Ct. at 746. "Judicial intervention in this area traditionally has been approached with great caution and restraint." *O'Brien v. Brown*, 409 U.S. 1, 4, 92 S.Ct. 2718, 2720, 34 L.Ed.2d 1 (1972). In order to proceed, a court must determine "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker v. Carr*, 369 U.S. at 198, 82 S.Ct. at 700. This last attribute of justiciability is crucial; the final remedy ordered by an article III court must be one of finality, binding upon the parties.

Once Wymbs has crossed this threshold and shown his claim to be justiciable, he must demonstrate that the Committee's conduct, as alleged, has amounted to, or would constitute, state action. This task is more difficult in political rights and apportionment cases in which the defendant is not the State or its express instrumentality. In the earlier fifteenth amendment cases, involving white-only primaries or other disenfranchisement of blacks, the courts freely found the conduct of political parties and groups to constitute state action.[14] But recently, courts

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14. *See Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944).

have hesitated to find state action when, as in this case, racial discrimination is not involved. *See Cousins v. Wigoda*, 419 U.S. 477, 483, n. 4, 95 S.Ct. 541, 545, n. 4, 42 L.Ed.2d 595 (1975) (reserving the question); *O'Brien v. Brown*, 409 U.S. at 4 & n. 1, 92 S.Ct. at 2720 & n. 1 (1972) (not deciding and entertaining "grave doubts" as to actionability of the claim); *Ripon Society, Inc. v. National Republican Party*, 525 F.2d at 574-76 (reserving the question but deciding the merits for the defendants).

In addition to these problems of justiciability and state action, Wymbs must deal with the strong first amendment freedoms of speech and association possessed by political parties. In a case somewhat similar to this one, the Supreme Court held that the first amendment protected the delegate- [501] selection rules of the National Democratic Party against a conflicting state law. *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981). *LaFollette* and cases like it[15] stand for the proposition that courts should not lightly disturb political parties' decisions of strategy. We now consider Wymbs' claims. For ease of analysis, we address count two first.

II.

Wymbs filed this case on the eve of the 1980 Republican National Convention. Florida was entitled to fifty-one delegates to that convention. Florida will be entitled to eighty-two delegates to the 1984 Republican National Convention. This increase is due to the success the Republican Party has enjoyed at the polls in Florida since the 1980 convention and the additional Congressional seats brought

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15. *See, e.g., Cousins; O'Brien; Ripon, supra.*

on by population growth.[16] This total consists of twenty-five delegates, selected by the Committee, who will be pledged to the winner of the 1984 statewide preference primary, and three delegates for each of Florida's nineteen congressional districts. These district delegates, and their alternates, must be registered Republican voters in the congressional district from which they are selected

A.

The practice of selecting delegates to Republican National Conventions from congressional districts is not new. The party most recently ratified this practice at its 1980 convention. *See* rules 30 & 31, *Rules Adopted by the 1980 Republican National Convention*, 13-16 (1980) (National Rules). Rule 11(4)(b), which Wymbs attacks, orders three delegates from each congressional district. It contains provisions substantively identical to those of the National Rules. Wymbs contends, however, that sending three delegates from each congressional district to the Republican National Convention is not required by the National Rules, but only by the state rules. The district court did not respond to Wymbs' contention. Our reading of the National Rules indicates that Wymbs is wrong; the National Rules do require that three delegates come from each congressional district.[17]

The preamble to the National Rules states that the rules govern how "delegates and alternate delegates shall

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16. Rule 30(A), *Rules Adopted by the 1980 Republican National Convention* (1980).

17. Of course, Wymbs brought this suit before the 1980 National Rules were adopted; therefore, the 1976 rules were controlling. National Rule 30(A)(2), quoted *infra* text accompanying note 18, remains unchanged from 1976 to the present. It is this rule which lays on the heart of Wymbs' complaint in count two.

be allotted to the respective states in the [1984] convention, and how their election shall be conducted and contests shall be considered." National Rules at 3. National Rule 30 states:

> The membership of the [1984] national convention shall consist of:
>
> A. Delegates
>
> 1. Six (6) delegates at large from each of the fifty (50) states.
>
> 2. Three (3) district delegates from the district of each Representative in the United States House of Representatives from each state.

In addition, Florida will receive nineteen [502] bonus delegates, for a total of eighty-two.[18] Thus the Republican National Committee,[19] which is not a party to this lawsuit, and the National Rules, which are not at issue in this lawsuit, require three district delegates from *each* district. But Wymbs maintains that National Rule 30 merely provides an option which the state party has selected. A careful reading of the National Rules and the relevant Florida law belies this claim. National Rule 31(f) does state that "[a]ll delegates from any state may be chosen from the state at large, in the event that the laws of the state in which the election occurs, so provide." Florida law, however, does not so provide.[20] Moreover, an at-large, state-

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18. National Rule 30(A) goes on to grant other delegate seats to Florida, such as bonus delegates. We are concerned in this count only with the constitutionality of selecting three delegates from every U.S. congressional district in Florida regardless of the number of registered Republicans in the district.

19. *See supra* note 7.

20. Florida has not so provided at any time relevant to this appeal. In Florida, selection of delegates to the national

(Continued on following page)

wide selection under National Rules 31(f) would not change the National Rule 30 requirement that three delegates come from *each* district. The contest for the congressional district delegate seats is simply moved from the district level to the state as a whole.[21] As the Republican National Committee stated in its amicus brief:

> For some time Republican National Conventions have chosen to incorporate by reference certain relevant provisions of state law in their rules, but, in the absence of state law provisions, [and Florida has none], the rules require that the three congressional district delegates be selected by the voters (or voter representatives) of the districts and not in at-large statewide elections or conventions. In any event, the congressional district delegates must be residents of and qualified voters in the districts they represent.

Brief of amicus curiae Republican National Committee at 4.

Footnote continued—

nominating conventions of political parties is governed by Fla. Stat.Ann. § 103.101 (1982 & Supp. 1983). The provisions touching most closely on this issue are those in § 103.101(8) which permit delegates to be allotted either on a winner-take-all or a proportional basis. This statute does not mandate any statewide election. In fact, this law assumes delegate selection will occur at both the statewide and congressional district levels, as is now the practice.

21. In other words the delegate selection process would occur on a statewide level, but three delegates would still have to come from each congressional district. If National Rule 31(f), which allows state-wide election of the three delegates residing in each congressional district, were applicable, there would be no constitutional issue at all in this case. The one person, one vote principle simply does not apply when the district serves as a unit of residence rather than a unit of voting. *Dallas County v. Reese*, 421 U.S. 477, 95 S.Ct. 1706, 44 L.Ed.2d 312 (1975) (per curiam). *See* J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 662 (1978). Unfortunately, such is not the case here.

B.

Count two of the complaint challenges State Rule 11(4)(b) only, as an improper manner of selecting delegates. State Rule 11(4)(b) incorporates and is subordinate to the National Rules. Because compliance with the National Rules is required in order properly to choose and seat a Florida delegation at the 1984 Republican National Convention, a serious question is raised as to whether the Republican National Committee is a necessary or indispensable party to this case.

[503] [3, 4] Our analysis of this joinder problem[22] is guided by Fed.R.Civ.P. 19.[23] An inquiry under rule 19 is a

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22. An appellate court may address joinder issues *sua sponte*. *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 106-08, 88 S.Ct. 733, 736-37, 19 L.Ed.2d 936 (1968); *GTE Sylvania, Inc. v. Consumer Prods. Safety Comm'n*, 598 F.2d 790, *aff'd on other grounds*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980); *Haby v. Stanolind Oil & Gas*, 225 F.2d 723, 724 (5th Cir.1955).

23. Rule 19 states in part:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring doubl , multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. . . .

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment,

(Continued on following page)

two-part test. First we must ascertain whether, under the standards of rule 19(a), the person in question should be joined, if feasible. If the person should be joined but cannot be (because, for example, joinder would divest the court of jurisdiction), then the court must inquire whether, applying the factors enumerated in rule 19(b), the litigation may continue. Rule 19(b) requires a court to determine how prejudicial a judgment would be to the nonjoined and joined parties, whether this prejudice could be lessened by the relief the court shapes, whether any judgment without joinder could be adequate, and, finally, whether the plaintiff would be left with any remedy should the court dismiss for nonjoinder. *Challenge Homes, Inc. v. Greater Naples Care Center, Inc.*, 669 F.2d 667, 669 (11th Cir.1982). In making the joinder determination, a court should be guided by "pragmatic concerns, especially the effect on the parties and the litigation."[24] *Smith v. State*

Footnote continued—

by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

24. Whether an absent party would be bound by res judicata is not the test. A court may not

proceed without considering the potential effect on nonparties simply because they are not "bound" in the technical sense. Instead, as Rule 19(a) expresses it, the court must consider the extent to which the judgment may "as a practical matter impair or impede his ability to protect" his interest in the subject matter.

Provident Tradesmens, 390 U.S. at 110, 88 S.Ct. at 738.

The Republican National Committee did not seek to intervene in this lawsuit. In its amicus brief it did not contend that the district court's injunction, if enforced, would impair the Republican National Party's ability to seat Florida delegates at its national convention in accordance with its rules. Rather, it argued, rather persuasively, that the district court's injunction could have no such effect because federal courts possess highly limited powers to interfere in the delegate selection process of a national political party. For this reason, we do not discuss the provisions of Fed.R.Civ.P. 19(a)(2).

Farm Fire & Casualty Co., 633 F.2d 401, 405 (5th Cir. 1980).

[504] When the district court's decision on count two is examined in light of rule 19, serious flaws shine through. Rule 19(a) requires joinder of the Republican National Committee, if feasible, if in that committee's absence (1) relief cannot be accorded among those already parties or (2) that committee claims an interest relating to the subject matter of the action and is so situated that disposition of this suit may as a practical matter impair or impede its ability to protect that interest or leave a current party at risk of double or inconsistent obligations.

The first point in rule 19(a) is of particular interest. Proper relief cannot likely be accorded the current parties in this suit without the Republican National Committee's presence. Wymbs sought to end, as unconstitutional, the selection of three delegates from each congressional district. The district court struck down the state rule mandating such selection. Unfortunately, however, its decision will have little or no effect; Wymbs still may not get the relief he seeks because the Republican National Convention, not the state executive committee, determines which delegates are seated.[25] "[F]or nearly a century and a half the national political parties themselves have determined controversies regarding the seating of their delegations." *O'Brien*, 409 U.S. at 5, 92 S.Ct. at 2720 (1972). *See* further discussion, *infra*. *See also LaFollette*, 450 U.S. at 123-24, 101 S.Ct. at 1019-1020; *Cousins*, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975).

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25. Elaborate intra-party procedures exist to settle delegate credentials disputes. The final decision rests with the Credentials Committee after one or both of two inferior Republican Party tribunals decide the matter. *See* National Rule 35.

The Republican National Committee, and the Republican National Convention, are free to continue enforcing National Rule 30, mandating three delegates per congressional district. Rule 11 of the *Republican Party of Florida Party Rules of Procedure* simply ensures that the delegates from Florida will be seated at the national convention. If the Florida party rules are at variance with the National Rules, the national convention may seat whomever it deems to have been selected in accordance with the National Rules. To be sure, the district court's injunction, if enforced, will cause the state party either to establish equally apportioned delegate districts on the basis of Republican registration, or to elect all delegates at large. But the court's injunction will have no effect on the National Convention. That body will seat only those delegates selected in accordance with its rules, and Florida will have none—save the six at large and the nineteen bonus delegates granted it under the National Rules. See *infra* at 510, slip. op. at .....

[5] Because the district court did not provide the plaintiffs effective relief, we would be correct, at this point, in furthering the rule 19 inquiry to determine the feasibility of joining the National Committee as a party defendant and also the need, or desirability, of remanding the case to the district court for this determination. Instead, we reverse count two because the joinder problem, the potential for serious infringement of the Republican Party's first amendment rights, and article III limitations on the district court's jurisdiction combine to make this controversy nonjusticiable. In so holding, we find no need to determine whether the Committee's implementation of Rule 11(4)(b) amounts to state action and denies registered Republicans in [505] Florida equal protection of the law, as the district court held.

C.

The fact that we find count two nonjusticiable should not be surprising. The Supreme Court has admonished federal courts to exercise "great caution," before we "interject [ourselves] into the deliberative processes of a national convention . . . involving as they do, relationships of great delicacy that are essentially political in nature." *O'Brien*, 409 U.S. at 4, 92 S.Ct. at 2720. The *O'Brien* Court expressed "grave doubts" as to the justiciability of judicial interference in delegate selection, and stated,

> Judicial intervention in this area traditionally has been approached with great caution and restraint. It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. *Highly important questions are presented concerning justiciability . . . . Vital rights of association guaranteed by the Constitution are also involved.*[26]

Id. at 4-5, 92 S.Ct. at 2720 (citations omitted) (emphasis added).

Shortly after the High Court decided *O'Brien*, Justice Rehnquist amplified that holding. The Republican State Central Committee of Arizona sought a stay from Justice Rehnquist in his capacity as Circuit Justice, requesting re-

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26. The Supreme Court in *O'Brien* reiterated, as we do here, that "[t]his is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single state." 409 U.S. at 4 n. 1, 92 S.Ct. at 2710 n. 1. The district court did not note this distinction.

lief from a district court's injunction that enjoined as violative of equal protection the use of the delegate bonus plan mandated under National Rule 30. The district court had held the plan unconstitutional because it was not related to the state's electoral college vote, Republican votes previously cast, or some combination thereof. *Ripon Society, Inc. v. National Republican Party*, 343 F.Supp. 168 (D.D.C. 1972). Like the district court below, the *Ripon* district court dealt with the justiciability issue cursorily. After a divided circuit panel denied a stay in an unpublished opinion, Justice Rehnquist granted a stay, citing the above passage from *O'Brien* and finding "the probability of error in the result below." *Republican State Central Committee of Arizona v. Ripon Society, Inc.*, 409 U.S. 1222, 93 S.Ct. 1475, 1477, 34 L.Ed.2d 717 (1972). In a subsequent case a nearly identical delegate selection rule was later upheld on the merits by the District of Columbia Circuit, en banc. *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C.Cir. 1975).

Besides the Supreme Court, and Justice Rehnquist in chambers, this circuit has added a warning concerning justiciability. We remanded this very case in light of *LaFollette* and noted the justiciability issues it raised. *Wymbs*, 658 F.2d at 325. The district court, however, in its dispositive memorandum opinion, failed to heed these admonitions concerning caution and justiciability. It acknowledged that "[v]oting rights cases often present difficult questions," [506] but summarily concluded that "resolution of [these questions] can be judicially managed. . . . If a breach of voters' rights can be shown, questions of justiciability do not preclude this court from enforcing constitutional protections by granting declaratory and injunctive relief." To the contrary, article III inhibits a federal court from entertaining any complaint that sets forth a claim that cannot be determined under judicially man-

ageable standards, or seeks relief that cannot be granted, or which, if granted, may seriously infringe the constitutional rights of others.

The district court did cite two cases from the District of Columbia Circuit, *Bode v. National Democratic Party*, 452 F.2d 1302, (D.C.Cir.1971), *cert. denied*, 404 U.S. 1019, 90 S.Ct. 684, 30 L.Ed.2d 668 (1972) and *Georgia v. National Democratic Party*, 447 F.2d 1271 (D.C.Cir.), *cert. denied*, 404 U.S. 858, 92 S.Ct. 109, 30 L.Ed.2d 101 (1971), to support its conclusion that count two of Wymbs' complaint presented a justiciable controversy. These two cases held that challenges to delegate selection rules of the National Democratic Party were justiciable. 452 F.2d at 1305, 447 F.2d at 1276-77. *But see Irish v. Democratic-Farmer-Labor Party*, 399 F.2d 119, 121 (8th Cir.1968). Both cases, however, involved challenges to the national selection rules and, unlike the instant case, the national party itself was sued. Moreover, they were decided prior to the Supreme Court's decisions in *O'Brien*, *Cousins*, and *LaFollette*. Were the District of Columbia Circuit called upon to decide these cases today, the court might reach a different result. In *Ripon Society, Inc. v. National Republican Party*, decided after *O'Brien* and *Cousins* came down, the court, sitting en banc, declined to decide whether a challenge to national party delegate selection rules was justiciable, observing, in passing, that it had previously regarded the issue as settled. 525 F.2d at 577; *see id.* at 592-95 (Danaher, J., concurring) (dispute nonjusticiable); *id.* at 602-604 (Tamm, J., concurring) (same); *id.* at 609-12 (Wilkey, J., concurring) (same).

1.

The Supreme Court in *Baker v. Carr* set forth two applicable criteria that an article III court should apply

in assessing the justiciability of a claim. The first criterion concerns policy making; it requires the court to stay its hand when faced with "the impossibility of deciding [the controversy] without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217, 82 S.Ct. at 710. The second criterion concerns the practicability of a judicial resolution of the controversy; it forbids the court from entertaining the suit if "judicially discoverable and manageable standards for resolving" the controversy are absent. *Id.*

Applying the first *Baker v. Carr* criterion, we conclude that to provide the relief Wymbs has requested would require this court to engage in political party policy making beyond its role in society and beyond our ken as article III judges. No doubt exists that Wymbs has actively and successfully competed in Republican Party affairs. He does not allege that he has been blocked from access to party affairs or invidiously discriminated against by anyone,[27] and does not assert that the party is [507] run undemocratically. As members of the State Executive Committee from Palm Beach and Broward Counties —strongly Republican areas—Wymbs, Cassady and Moss have a special vantage point from which to change the innermost workings of the state party. The Wymbs group, apparently having failed in its attempt to alter Florida's delegation to the Republican National Convention so that the areas of the State in which Republicans are more nu-

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27. Wymbs alleges no invidious discrimination of any type. He does not allege that he has been denied access to party office, party votes, or party podiums. This fact alone distinguishes this case from *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), and *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), where the Supreme Court was quick to intervene in political affairs. *Accord, O'Brien*, 409 U.S. at 4, n. 1, 92 S.Ct. at 2710 n. 1; *Irish v. Democratic-Farmer-Labor Party*, 399 F.2d 119, 120 (8th Cir.1968).

merous receive greater representation, has turned to an outside source, the federal courts, for assistance. The Supreme Court, in the recent cases we have cited, has cautioned against such interference in the inner workings of political parties. The Eighth Circuit has issued the same caution; it declined an invitation similar to the one Wymbs has exended us in this case. In *Irish v. Democratic-Farmer-Labor Party*, 399 F.2d 119, 121 (8th Cir.1968), the court was asked to overturn a rule of a state political party which permitted national nominating convention delegates to be selected from malapportioned districts. The court, noting no actual or claimed invidious discrimination, refrained from interfering:

> [I]n cases of this kind there are substantial and almost insurmountable problems with respect to remedy which would arise were we to favor the position of the plaintiffs here. These relate to the nature of the relief to be granted, the ensuing necessity of close court supervision, and the realization that, in any event, any remedy we might attempt to fashion might well not effectuate numerical equality ultimately anyway.

Id. at 120. *See Lynch v. Torquato*, 343 F.2d 370, 373, (3d Cir.1965); *Ripon*, 525 F.2d at 592-95, (Danaher, J., concurring) (federal intervention into intra-Republican Party dispute non-justiciable), *id.* at 602-604 (Tamm, J., concurring) (same); *id.* at 609-13 (Wilkey, J., concurring) (same).

We think it plain that this court is an inappropriate body to decide how the Florida delegation to the Republican National Convention should be selected. The controversy Wymbs presents in count two of his complaint is a disagreement over a pure question of internal Republican

Party policy.[28] The Supreme Court has held that "it is not for the courts to mediate the merits of [such a] dispute. . . . [A] court may not constitutionally substitute its own judgment for that of the Party." *LaFollette*, 450 U.S. at 123-24, 101 S.Ct. at 1020 (1981).

The district court's conclusion that federal courts are competent to make the kind of policy decision Wymbs sought in count two resulted from its adamant reliance on the one person, one vote rule of *Gray v. Sanders*.[29]

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28. In addition to promoting the party's ideology and nominating successful candidates, a party's goals may include "rallying of voters . . . not only in an appeal to party members but to independent voters and even to members of an opposition party," *Ripon*, 525 F.2d at 593; encouraging the participation of minorities, women and young people, *id.* at 583-84; and according greater weight in party decision making to "professionals," *id.* at 585, or to geographic segments of the party's constituency whose performance suggests likely success or, conversely, a need for retrenchment.

29. The *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), holding was a response in part to the one-party rule prevalent then in Georgia. *See Ripon*, 525 F.2d at 589 n. 65. *Gray* was a challenge to a primary system in Georgia whereby voting was disproportionately weighted by counties. We deal in the instant case with a challenge only to a *party* selection rule for national convention delegates, not an express state statute mandating disproportionate primary voting in a state where the primary is tantamount to an election, as was the case in *Gray*. Justice Douglas' opinion for the majority was expressly limited to primary elections, and did not reach issues concerning party conventions or delegate selections. *Gray*, 372 U.S. at 378 n. 10, 83 S.Ct. 807 n. 10. Moreover, the *Gray* Court was not faced with first amendment issues. In the years since *Gray*, the Supreme Court has afforded broad protection to the speech and associational rights of political parties. *See O'Brien, Cousins, LaFollette, supra. See also Belluso v. Poythress*, 485 F.Supp. 904, 912 (N.D.Ga.1980) ("The plaintiffs' claims are weakened to the extent that the plaintiffs seek constitutional interference with internal party decisionmaking."); *Fahey v. Darigan*, 405 F.Supp. 1386, 1396-98 (D.R.I.1975) (statute affixing size of party committees is unconstitutional). *Gray* is further distinguishable because the Court explicitly ordered apportionment based strictly on population. 372 U.S. at 371, 378, 379, 83 S.Ct. at 803, 807, 808. In the instant case, the district court equated party registration, not population, with equal representation.

The one person, one vote rule requires [508], simply, equal representation of all people. Federal courts are well situated to apply this rule and to fashion an enforceable remedy. *See Hadley v. Junior College District*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970); *Avery v. Midland County*, 390 U.S. 474, 481, 88 S.Ct. 1114, 1118, 20 L.Ed.2d 45 (1968); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). The district court purported to follow this rule, but did not; instead, it created a new rule —one registered Republican, one vote. In taking this step, the district court actually decided whom the Republican Party must represent.[30] The Party, and its delegates in national convention, may only represent registered Republicans. The court justified its holding "because the Florida Statutes bind each delegate [to the Republican National Convention] to support the Republican candidate he or she was elected to support." This holding is a policy decision that federal courts are ill equipped to make and a

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30. Judges simply are not well-positioned to make these decisions of policy. The district court, for example, did not take into account the fact that delegates serve a number of important roles at quadrennial national conventions besides nominating the presidential ticket. Delegates also set the rules, platform, and direction of the national party for the next four years. Further, the district court failed to give adequate consideration to the claims of the Committee and amicus that as a minority party the Republican Party must appeal to and represent voters who are not registered Republicans. *See infra* notes 31, 39.

The District of Columbia Circuit stated in *Bode*:

> It seems to us that the constituency represented at a national convention does not comprise solely "Democrats," so defined. To the extent that a voter, whether he be a registered Democrat or Republican, third party adherent or independent, is given alternate slates by the two major parties, he has a stake in the outcome of the nominating process of both parties. Accordingly, the constituency for a national convention comprises to a certain degree the entire electorate.

Bode v. National Democratic Party, 452 F.2d 1302, 1306-1307 (D.C.Cir.1971), *cert. denied*, 404 U.S. 1019, 92 S.Ct. 684, 30 L.Ed.2d 668 (1972).

decision not logically required by Florida law. The district court did not explain why a Florida Republican delegate, who is bound to a candidate in a limited way, could not represent persons other than registered Republicans.[31]

[509] Wymbs contends that the equal protection clause requires that delegate seats be equally divided among only those who are able to fill them, registered Republicans. The Committee and amicus contend, of course, that the equal protection clause does not apply to delegate selection, and, further, that as a matter of strategy, if not survival, the Republican Party, as a minority party, must grant identical representation to all Florida congressional districts. They argue that even though Republican registration may be low, the party vote in most Florida congressional districts, at least in national elections, is often high. The Committee and amicus cite persuasive proof to this effect.[32] One United States Court of Appeals has already

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31. Delegates, of course, perform many functions besides voting for a presidential nominee. *See supra* note 30. They are not bound to the candidate for whom they are selected if their candidate receives less than 35% of the convention vote, if their candidate has not won nomination by the second ballot, or if the candidate releases his delegates. Fla.Stat.Ann. § 103.101 (6) (1982). Even if the only thing the delegates do is select a presidential nominee, and even if they were bound irrevocably to the candidate for whom they were selected, we fail to see how this requires a one registered Republican, one vote rule. The district court did not explain its holding; it is simply a non sequitur.

32. The Republican Party is more of a minority party in Florida than it is in the nation as a whole. Only 31.6% of voters registered to a party in Florida declare themselves to be Republicans. The nationwide figure is 36.3%. 1981 Republican Almanac 639. This minority status notwithstanding, the Republican presidential candidate has carried Florida six out of the last eight times, in every presidential election since 1952 except 1964 and 1976. In 1980, Floridians elected Republican members of Congress from the fifth, sixth, tenth and twelfth congressional districts. In each of these districts, Democratic Party registration exceeded Republican. M. Barone & G. Vjifusa, The Almanac of

(Continued on following page)

declined to define the constituency of a national political party. *Ripon*, 525 F.2d at 584-87 & n. 58. The district court should have exercised similar restraint.

Even if we thought a federal court could, consistent with article III, define the constituency of the Florida Republican Party and decide how that constituency could best be represented at the national convention, we would be constrained by the Party's countervailing first amendment rights of free speech and association. Political parties have strong and time honored rights of free speech and association. Political speech is accorded dutiful protection because it "is more than self-expression; it is the essence of self-government." Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harvard L.Rev. 1, 18 (1965). A political party and its members also "enjoy a constitutionally protected right of political association . . . . Moreover, '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.'" *Cousins*, 419 U.S. at 487, 95 S.Ct. at 547 (1975), quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1212, 1 L.Ed.2d 1311 (1957).

The district court passed over the first amendment in its heavy reliance upon *Gray v. Sanders*,[33] *supra*. The district court should have heeded the admonition of the Fifth Circuit, when it remanded count two of Wymbs' complaint for reconsideration, to look to *LaFollette* for guidance. *LaFollette* instructs that,

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Footnote continued—

American Politics 1982, 213-42. These figures indicate that the Republican Party in this state relies heavily on voters not registered Republican. The Party's "constituency," i.e., who it represents, may very well be broader than registered Party members. As we state in the text, federal courts are not particularly well suited to make this determination.

33. *See supra* note 29.

> [t]he freedom to associate for the "common advancement of political beliefs" necessarily presupposes the freedom to identify the people who constitute the association. . . .
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> [A] State, or a court, may not constitutionally substitute its own judgment for [510] that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution.

450 U.S. at 122, 123-24, 101 S.Ct. at 1019-20 (citations omitted).

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[6] The second justiciability criterion set forth in *Baker v. Carr* requires a federal court to stay its hand if there is a "lack of judicially discoverable and manageable standards to resolve the controversy presented." 369 U.S. at 217, 82 S.Ct. at 710. A court must have the ability to determine facts, bind parties, and fashion an effective remedy. This last requirement is of special importance. If the court cannot relieve the harm of which a plaintiff complains, the court should not take the case; in the absence of an effective remedy its decision can amount to nothing more than an advisory opinion. Article III courts must follow "the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive . . . ." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 569, 82 S.Ct. 1459, 1482, 8 L.Ed.2d 671 (1962); *United States v. Jones*, 119 U.S. 477, 478, 7 S.Ct. 283, 30 L.Ed. 440 (1886); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 1 L.Ed. 436 (1792).

The district court's injunction is a classic example of an order that is not conclusive; for it provides no effective relief.[34] Notwithstanding the court's order to the contrary, the Republican National Party had the final say on what Florida delegates were seated at the 1980 convention, and the Party will have the final say, again, in 1984. *Cousins, supra; LaFollette, supra.* Wymbs, in an effort to convince us that the district court's injunction does provide effective relief, disclaims any interest in whether delegates selected according to his favored scheme are actually seated at the convention. He represents that his sole concern—and therefore the court's—is with the delegate selection in this state. Wymbs, in his brief, concludes with emphasis that an injunctive order embracing his scheme "*can* be enforced." But such an order would be, at best, of trifling effect. Wymbs' real complaint—that Republican National Convention seats Florida delegates who are chosen unconstitutionally—would remain unrelieved. A judgment that neither creates relief nor binds the parties to the court's will is not a judgment that an article III court may render.

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34. *See* the discussion of joinder, *supra* at 503-505, slip op. at .....-..... An all-purpose definition of justiciability has never been published because of the "notorious difficulty" of defining the concept. Marshall, *Justiciability*, in Oxford Essays in Jurisprudence: A Collaborative Work 265, 269 (A.G. Guest, ed., 1961), quoted in Barton, *Justiciability: A Theory of Judicial Problem Solving*, 24 B.C.L.Rev. 505, 506 (1983). *See also* J. Nowak, R. Rotunda & J. Young, Constitutional Law 54-57 (1978); L. Tribe, American Constitutional Law 53 (1978). Justice Frankfurter noted this difficulty when he wrote,

> Justiciability is of course not a legal concept with fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of issues for decisions . . . and the actual hardship to the litigants of denying them the relief sought.

Poe v. Ullman, 367 U.S. 497, 509-09, 81 S.Ct. 1752, 1758, 6 L.Ed.2d 989 (1960). Because the district court in this case simply did not provide effective relief, our decision is not difficult or subtle, but is a matter of simple practicality.

There is another reason why the district court could not give effect to Wymbs' delegate [511] selection scheme. The court would find it difficult, if not impossible, to reapportion Florida's delegate districts so that each contained nearly the same number of registered Republicans.[35] In fact, neither Wymbs nor the district court has suggested how such a reapportionment could be done. Decennial population census figures would, of course, be irrelevant in realigning delegate districts to reflect one registered Republican, one vote. It is true that each Florida county maintains a current voter registration list by party, *see* Fla. Stat.Ann. §§ 98.051; 98.081; 98.201 (1982 & 1983 Supp.); so the court could, in theory, realign the delegate districts at a given point in time. But it is far from clear that this would satisfy the one registered Republican, one vote standard. If realignment occurred while voters were registering, the realignment might be obsolete by the time the delegates were chosen. The only time voter registration figures are static is during the 30-day closure periods before primary and general elections. Fla.Stat.Ann. § 98.051.[36] Using these closure periods to apportion would mean that dele-

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35. We are mindful that the district court did not order delegate districts to be reapportioned. Rather, it merely struck down rule 11(4)(b) which provides that three delegates be selected per congressional district. The effect of the district court's holding, however, is to require selection of delegates from apportioned districts. The Florida Republican Party may not select delegates in a statewide at-large procedure under National Rule 31(f) because Florida law does not so provide. *See* discussion *supra* at 502, slip op. at .....

36. Population figures are not inherently dynamic. They change at a slow and steady rate. For reapportionment purposes, this change, no matter how dynamic, occurs once every 10 years. Party registration figures, however, are very fluid. Individual voters who have not voted within two years may be purged from the books. Fla.Stat.Ann. § 98.081 (1982). Moreover, voter registration drives can add tens of thousands of voters to party rolls within weeks. Therefore, apportionment on the basis of party registration would be required much more frequently than reapportionment based on population.

gate candidates would not know against whom or in what district they would be running until thirty days before the election. The confusion and unmanageability inherent in such an apportionment scenario is obvious.[37]

To summarize our holding on count two, we decline to reach the state action and equal protection issues reached below, but, instead, reverse because because the claim presented in count two is nonjusticiable. Wymbs attacked state rule 11(4)(b), which provides that three Republican National Convention delegates be chosen from each congressional district. That rule does not control what Florida delegates are admitted to the convention, however. The National Rules control this issue, but Wymbs failed to sue the Republican National Committee, thus denying the court the power to afford him effective relief. Besides this potentially fatal joinder problem, the strong first amendment associational freedoms possessed by political parties limited the district court's ability to tell the Republican Party how to conduct its internal affairs and whom it should represent. Finally, enforcement of a one Republican, one vote rule would pose insurmountable practical and legal problems for the district court.

III.

The district court, in count one, enjoined the Committee from promulgating any [512] rules for the conduct of the presidential preference primary or from placing anyone on a ballot for a statewide office until it changed its voting procedure so that each county representative

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37. Indeed, Wymbs was confused during the proceedings in the district court as to the difference between a one person, one vote standard and a one registered Republican, one vote standard. In his complaint he requested the latter while his prayer for relief requested the former. His motion for summary judgment then requested the latter.

on the Committee represented an equal number of registered Republicans. The court did so because it viewed these two Committee functions, if performed, as state action which would violate the equal protection clause. We do not pass on these issues. The district court, in adjudicating this arguably unripe count, granted only partial relief that did not cure the perceived unequal representation on the Committee, and may have made it worse. Wymbs asked for, and received, relief that the district court's own interpretation of equal protection forbids. For this reason, we reverse.

Our initial concern is whether Wymbs' count one claim is ripe. A controversy must be ripe, presently ready for corrective action to be taken. It must not be contingent upon future events, especially those which are unlikely. Sound reasons of policy lay behind this requirement. *See* J. Nowak, R. Rotunda & J. Young, Constitutional Law 64-66 (1978). The most important of these is that until the controversy has become concrete and focused, a court cannot evaluate the practical merits or the position of each party, especially in matters of constitutional determination. *Id.* at 65.

[7] The district court enjoined the Committee from promulgating rules for the presidential preference primary or from placing anyone in nomination—the only functions the court found to be state action—until the Committee realigned its voting procedure. Wymbs' equal protection challenge in this count is thus limited to an attack on these functions. The record, however, is devoid of any showing that the Committee has ever filled a vacancy for nomination to statewide office[38] or will ever fill such a

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38. The nomination must go vacant, most likely through death or serious illness, after September 15 of the election year. *See* Fla.Stat.Ann. § 100.111(3)(b) (1982).

vacancy. Likewise, nothing in the record indicated that the Committee was promulgating, or planned to promulgate, additional presidential preference primary rules. The relief accorded was a prospective injunction against a set of facts that was not shown to have occurred previously, was not occurring, and is most unlikely to occur in the future. For relief in the federal courts, a hypothetical threat is not enough. *United Public Workers v. Mitchell*, 330 U.S. 75, 90, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947). Wymbs must show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the Committee's conduct, and the injury must be both real and immediate, not conjectural. *City of Los Angeles v. Lyons*, ... U.S. ....., 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) (citing cases). But we need not ground our count one decision on ripeness. Instead, we ground our decision on a fundamental defect in the district court's dispositive order.

The court held that because the Committee's county representatives did not represent equal numbers of registered Republicans, they could not perform the state action functions of prescribing presidential primary rules and filling vacant nominations for statewide office without violating the equal protection clause. Thus, the district court enjoined the Committee from conducting these two activities until it apportioned itself on a one registered Republican, [513] one vote standard.[39]

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39. We do not decide the issue, but serious doubt can be raised concerning the wisdom of a one registered Republican, one vote standard rather than a one person, one vote standard. This issue, discussed briefly in the text, *supra*, requires a district court to make decisions it is not well equipped to handle, such as whom the Republican Party represents. *See supra* notes 30 & 31. *See also, Gray v. Sanders*, *supra* note 29, (Supreme Court ordered Georgia primary districts apportioned on basis of population, not party registration). *See also supra* text accompanying note 36.

A one registered Republican, one vote standard is simply the one person, one vote standard of the apportionment cases extended one step further. The one person, one vote concept is limited primarily to cases involving legislatures or bodies performing legislative functions.[40] Wymbs argues that the Committee is a rulemaking legislative-type body.[41] Thus, the Committee's "legislators" cannot vote on state action matters unless the Committee is "reapportioned" to accord registered Republicans equal representation. If one assumes that the Committee engages in state action and the fourteenth amendment requires a one-registered Republican, one vote rule, the

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40. One person, one vote does not, for example, apply to the election of state judges, *Wells v. Edwards*, 347 F.Supp. 453 (M.D.La.1972), *aff'd mem.* 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973); *Buchanan v. Rhodes*, 249 F.Supp. 860 (N.D.Ohio), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966), or to "special purpose assemblies," *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 727, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973). The standard also does not apparently apply to state constitutional conventions. *Driskell v. Edwards*, 374 F. Supp. 1 (W.D.La.) *vacated on other grounds*, 419 U.S. 812, 95 S.Ct. 26, 42 L.Ed.2d 38; *Bates v. Edwards*, 294 So.2d 532, 534 (La.1974); *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474 *cert. denied sub nom. Lindsay v. Kelley*, 395 U.S. 827, 89 S.Ct. 2130, 23 L.Ed.2d 738 (1969); *Livingston v. Ogilvie*, 43 Ill.2d 9, 250 N.E.2d 138 (1969).

41. This analogy to a legislature, which perforce must be a part of Wymbs' argument, is somewhat stretched at points. For example, the appointment of nominees for election vacancies resembles an executive, not a legislative, function. The Supreme Court has never held that one person, one vote is applicable to the selection of delegates to political party nominating conventions. *See Cousins*, 409 U.S. at 483 n. 4, 95 S.Ct. at 545 n. 4. Federal district courts are divided on this point. *See Ripon*, 525 F.2d at 579 n. 29 (citing cases). No U.S. Circuit Court has held the one person, one vote rule applicable to selection of delegates to national political conventions. Two circuit courts have rejected this contention. *See Ripon*, 525 F.2d 578-87 (D.C. Circuit) and *Irish*, 399 F.2d 119-25 (8th Cir.). Wymbs would not just have us become the first circuit to apply this rule to delegate selections. He would have us take one step further and apply a one registered Republican, one vote standard. *See Bode*, 452 F.2d at 1305-1307, where the District of Columbia Circuit declined to enforce such a "rigid formula."

district court's injunctive order would appear to have settled the issue squarely. The Committee, with the votes of each county committeemen and committeewomen duly weighted, would indeed equally represent registered Republican voters across the state. The one person, one vote analogy, as extended to registered Republicans, would be satisfied.

The district court and Wymbs, however, overlooked the Florida statute that dictates, in part, the membership of a state executive committee, Republican or Democrat.[42] Fla.Stat.Ann. § 103.091(6)(a) (1982 & 1983 Supp.). They assumed that the Committee consisted of 134 members, two [514] per Florida county,[43] and the district court based its injunctive order[44] on this assumption. The statute, however, requires that a number of other persons sit on the Committee in addition to the two from each county. The statute states:

> Each political party of the state shall be represented by a state executive committee.
>
> * * *

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42. The Florida statute outlining the powers and functions of political parties' State Executive Committees, Fla.Stat.Ann. § 103.091 (1982 & Supp. 1983), applies, of course, to both the Republican and Democratic Party. We do not hazard a guess as to what effect an affirmance of the district court would have upon the State Executive Committee of the Florida Democratic Party.

43. The rule that two persons from each Florida county—a committeeman and a committeewoman—sit on the Committee is a rule of the Florida Republican Party. Fla.Stat.Ann. § 103.091 (1) provides: "A political party may provide for the selection of its national committee and its state and county executive committees in such a manner as it deems proper."

44. The pertinent section of the district court's order states without elaboration, "Defendant Executive Committee is enjoined from promulgating any rules for the conduct of the Presidential Preference Primary or from filling any vacancy in nomination until it has implemented a voting procedure which equally represents registered Republican voters across the state."

Each state executive committee shall include, as at-large committeemen and committeewomen, all members of the United States Congress representing the State of Florida who are members of the political party, all statewide elected officials who are members of the party, the President of the Senate, the Minority Leader in the Senate, the Speaker of the House of Representatives, the Minority Leader in the House of Representatives, and 20 members of the Legislature who are members of the political party. Ten of the legislators shall be appointed with the concurrence of the state chairman of the respective party, as follows: five to be appointed by the President of the Senate; five by the Minority Leader in the Senate; five by the Speaker of the House of Representatives; and five by the Minority Leader in the House. The governing body of each state executive committee as defined by party rule shall include as at-large committeemen and committeewomen all statewide elected officials who are members of such political party; up to four members of the United States Congress representing the State of Florida who are members of such political party and who shall be appointed by the state chairman on the basis of geographic representation; the permanent presiding officer selected by the members of each house of the Legislature who are members of such political party; and the minority leader selected by the members of each house of the Legislature who are members of such political party. *Each at-large committeeman or committeewoman shall be entitled to a single vote;* however, any such at-large committeemen and committeewomen holding another voting position on a committee shall be entitled to only one vote.

Fla.Stat.Ann. §§ 103.091(1) and (6)(a) (1982 & 1983 Supp.) (emphasis added). Although by party rule two persons represent each county on the Committee, the statute mandates that up to fifty-one[45] additional persons be seated on the Committee. Although the statute labels these additional members "at-large committeemen and committeewomen," only the statewide elected [515] officials and United States Senators, a maximum possibility of ten, would be truly "at large" in the constitutional sense. The other members would be elected by, and thus represent, discrete districts. Given the operation of this statute and the two-per-county rule, the Committee, at the time this case was pending in the district court, had district representatives from four types of districts: counties, state representative districts, state senatorial districts, and United States House of Representative districts.

It is clear to us that what the district court did in this case, at Wymbs' invitation, of course, was to apply the equal protection clause only to a portion of the Committee, the 134 county representatives. If the one registered Republican, one vote standard is the law,[46] the district

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45. This figure includes up to 21 members of Congress, up to eight statewide officers, *see Fla. Const.* art. IV §§ 4-6, the two party leaders in the legislative houses, and 20 party members in the legislature. If Florida's eight statewide officers, two U.S. Senators, and 19 U.S. Representatives were all Republicans, these officeholders would become members of the Committee as would the 20 party members and two party leaders in the legislature: for a total of 51 additional Committee members.

46. Section 103.091(6)(a) orders a marked departure from the district court's and Wymbs' pristine concept that registered Republicans must equally (and only) represent registered Republicans on the Committee. The section places U.S. Representatives and Florida legislators on the Committee. Although these legislators must be registered Republicans, they are, in many instances, elected by constituencies consisting largely of registered Democrats. Unlike a Committee member chosen only

(Continued on following page)

court's injunctive order is unconstitutional and cannot stand. We conclude that the court dealt only with the county representatives on the Committee because they are the only Committee members mentioned in the court's dispositive instruments, in the record, and in the briefs on appeal. Nowhere is there any reference to the "at-large" Committee members created by section 103.091 (6)(a).

We could not affirm the district court even if we assumed that Wymbs, in count one of his complaint, asked the court to realign the *entire* Committee, county representatives and the statutory "at-large" members alike, to conform to the one registered Republican, one vote standard, and that the court mandated such realignment. We reach this conclusion for two reasons.

Footnote continued—

by registered Republicans to represent his or her county, a Republican U.S. Congressman from a heavily Democratic area who is appointed to the Committee via § 103.091(6)(a) may act in the Committee (as well as in the U.S. House) in the interest of all voters in his district, especially the Democratic voters who control his political future. The same holds true for the other Committee members appointed under § 103.091(6)(a). The statute thus permits non-Republicans indirectly to elect members to the Committee because the only persons eligible for appointment to the Committee by that section are those chosen first by the general electorate. Accordingly, § 103.091(6)(a) corrodes the very heart of Wymbs' argument, that Committee members only represent, and should only be chosen by, registered Republicans.

Wymbs paid no mind to these statutorily designated Committee members. He sought only to have the Committee partially reapportioned by weighting the vote of county committeemen and committeewomen. Partial reapportionment of the county votes would still render Committee voting well out of line with the one registered Republican, one vote standard fashioned by the district court. Wymbs did not attack the statute; he asked for only half a loaf—a half loaf that the Constitution, as interpreted by the district court, forbids.

A.

First, the controlling Florida statute, section 103.091 (6)(a), expressly provides that each "at-large" member it creates "shall be entitled to a single vote"; thus, the statute does not permit the Committee to weight the votes of these members.[47] In short, [516] the court was presented with an unambiguous statute, which Wymbs had not challenged, that was not open to construction; that is, a court would have to conclude that the Florida legislature intended that the votes of the "at-large" members not be weighted. To assume that the district court realigned the *entire* Committee membership to satisfy equal protection is, therefore, to say that the court legislated a new state executive committee scheme for political parties in Florida, a remedy article III plainly would foreclose.

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47. If the statute is followed literally, the Committee is powerless to weight any votes except for committeemen and committeewomen from counties. Additionally, if the Committee is eventually called on to exercise the two functions that the district court found were state action, the Committee may not refrain from exercising them because they are required by Florida law. These two functions are mandated by the State; the Committee has no discretion not to perform them. *See Fla.Stat.Ann.* §§ 100.111(3)(b) and 103.101(5). Thus, the Committee cannot comport itself with the district court's order simply by refraining from filling nomination vacancies and writing rules for the presidential primary. The district court's injunction, therefore, requires the Committee to violate § 103.091(6)(a) by weighting its members' votes, or to violate other provisions of Florida law by not performing the two functions at all.

Weighted voting would not be necessary if all members of the Committee were elected in a statewide at-large election in which only registered Republicans could participate. Practical concerns alone would render such an election not feasible. A 140-160 person committee cannot be elected on one statewide ballot. If the election of each Committee seat were contested, the ballot would contain at least 300 names and obviously would be unmanageable. Moreover, such an election scheme, restricted to registered Republicans, would conflict with the spirit of Fla. Stat.Ann. § 103.091(6)(a). This statute creates Committee seats than can only be filled by persons elected to Congress, to the state legislature, or to state-wide office in a general election.

B.

Second, a district court order requiring the realignment of the entire Committee so that each member represented an equal number of registered Republicans cannot be enforced. To comply with such an order, the Committee would have to weight the votes of the following members according to the number of registered Republicans in their respective districts: the 134 committeemen and committeewomen representing counties, the party leader in the Florida Senate, the party leader in the Florida House of Representatives,[48] the twenty legislators appointed under § 103.091(6)(a), and all Republican U.S. Congressmen from Florida.[49] This would be an impossible task, one well beyond the ability of a federal district judge to supervise.

We can best illustrate the difficulty of this task by considering how one would weight the votes of a hypothetical Republican State Senator whom the Senate Minority Leader appointed to the Committee pursuant to section 103.091(6)(a). The Senator's vote on the Committee could not be weighed, of course, until the Minority Leader appointed him. Once appointed, his vote on the Committee would have to be weighted so that each of his Republican constituents and every registered Republican in

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48. The record in this case shows that the Republican Party is a minority party in Florida. As such, it usually holds a minority position in both houses of the state legislature and is led there by the Minority Leaders. We have employed the term Minority Leader in the hypothetical example which follows in the text.

49. *See Fla.* Const. art. III, § 16. State Senate districts are approximately three times the size of State House of Representative districts. The Florida Constitution requires the State to be apportioned into 30-40 equally populous senatorial districts and 80-120 equally populous representative districts. *Id.* In contrast, Florida now has 19 United States House of Representative districts.

the State received the same quantity of representation on the Committee. Assume that the Senator's district contained 10,000 registered Republicans and is conterminous with County A. Assume, further, no other statutory appointees to the [517] Committee. Registered Republicans in County A would have three representatives on the Committee: the Senator, plus two committeepersons representing the county. The votes of these three could be weighted so that, in effect, there would be one Committee vote for each 3333 registered Republicans. Each of the three would cast one vote. County B, across the state, also has 10,000 registered Republicans but no State Senator or other statutory appointee representing it on the Committee. The committeeman and committeewoman from County B would thus possess committee votes with each, in effect, representing 5,000 registered Republicans. Each would cast one and one-half votes and registered Republicans in County A and County B would be equally represented.

The difficulties become insurmountable, however, when the election districts do not correspond to the counties. Suppose the Minority Leader appointed another State Senator to the Committee whose district encompassed all of County X, with 14,000 registered Republicans, about half of County Y, and a slice of County Z. No one would know exactly how many Republicans were registered in the half of County Y and the sliver of County Z that the new Senator represented. The Committee, in weighting its members' votes, would have to take a precinct by precinct count to determine exactly how many registered Republicans were in the Senator's district in both County Y and County Z. Once this was determined, the weighting could occur. The weighting would be rather simple for County X, but simply im-

possible for Counties Y and Z. About half of the Republicans in County Y, and a few Republicans in County Z would be represented by the Senator *and* the committeemen and committeewomen from their county. The remainder of registered Republicans in Counties Y and Z would be represented only by their county committeeman and committeewoman. But all Republicans must be equally represented. The committeemen and committeewomen from Counties Y and Z, therefore, would have to be given more votes when representing those Republicans in their counties who were not in the Senator's district, and fewer votes when representing those whom the Senator also represented. There would be no way to create such a variable weighting system, however; no matter how one might weight the Senator's and the county committeepersons' votes. Republicans from those counties would be represented unequally. The only alternative might be some sort of unfathomable system by which the votes from the county representative would be somehow downweighted to account for the fact that the Senator represented only parts of the counties. A simple downweighting, of course, would cheat those Republicans living in the two counties outside of the senatorial district.

The foregoing is a very mild permutation on the difficulty that weighting the Committee votes would present.[50] When one considers more realistic examples, the weighting becomes even more onerous. Assume, for example, that the Minority Leader in the Florida House appointed a State Representative to the Committee whose district encompassed part of County X and part of County

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50. For an even milder and much less complicated scenario involving the weighting of county committee votes from a single county in one U.S. House of Representatives race, *see Montano v. Lefkowitz*, 575 F.2d 378 (2d Cir.1978).

Y. How could his committee vote be weighted properly to take into account the representation already afforded by the State Senator from Counties X, Y and Z, above, or, say, the [518] Republican U.S. Congressman whose seven and one-half county district included half of County X and all of Counties Y and Z? If a county were represented on the Committee by the committeeman and committeewoman from the county, a U.S. Representative, a State Senator, and a State Representative, the Committee votes of all of them would have to be drastically downweighted to avoid overrepresentation. Perhaps the committeeman and committeewoman could be given negative votes. Each individual Committee vote from every district—approximately 160 in all—would have to be apportioned simultaneously and in an equal ratio across the state.

Besides the murk presented by *how* the votes would be weighted, it remains totally unclear *when* weighting would have to occur. Apportionment based upon population is a simple decennial task. The district court, however, ordered the Committee to reapportion its voting on the basis of party registration. Registration totals vary continually by county. *See* discussion *supra* at 510-511, slip op. at ..... - ..... In order to weight its vote properly, the Committee would need party registration figures for every county, State Senatorial district, State Representative district, and U.S. Congressional district. As seen in the above hypothetical, the weighting would also require precinct registration totals. Reweighting, at the very minimum, would have to be done every two years after Florida and U.S. Congressional elections resulted in changes on the Committee. More likely, however, the district court's standard could not be met unless the Committee were reweighted before every Committee vote. If the voting structure were weighted in January, the weight-

ing would be obsolete by June—given the inevitable changes in registration rolls—and the one registered Republican, one vote standard would not be met.[51] The constant need for weighting these 160-odd Committee seats, which would require microscopic geometric exactitude and algebraic sleight of hand, would, to borrow from Justice Cardozo, plunge the district court into a Serbonian Bog.[52] *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 499, 54 S.Ct. 461, 473, 78 L.Ed. 934 (1934) (Cardozo, J., dissenting).

[8] When we consider the practical impossibility of this task, the ripeness problem, and the fact that section 103.091(6)(a) in plain terms proscribes weighting in the first place, the only reasonable conclusion is that Wymbs' count one claim is non-justiciable. Workable realistic standards are, to put it mildly, absent.[53] *Baker v. Carr*, 369 U.S. at 217-18, 82 S.Ct. at 710. A federal court's ability to ensure and supervise fair and final relief based on one registered Republican, one vote is nil. *Id. See also, e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948).

For the foregoing reasons, the district court's final judgments on both counts of the complaint are reversed. The district court, upon receipt of the mandate, shall dismiss the complaint.

REVERSED.

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51. *See supra* note 36. Because population changes are recorded every 10 years, legislative reapportionment is normally a decennial task. Party registration totals are recorded almost continually, however, and apportionment on that basis would be a regular, almost constant, necessity.

52. "A gulf profound as that Serbonian Bog . . . where armies whole have sunk." J. Milton, Paradise Lost, book II 1.592.

53. *See* discussion *supra* at 510-511, slip op. at .....-.....

RULES OF THE REPUBLICAN PARTY OF THE UNITED STATES

MEMBERSHIP IN THE NEXT NATIONAL CONVENTION

RULE NO. 30

The membership of the next national convention shall consist of:

A. Delegates

1. Six (6) delegates at large from each of the fifty (50) states.

2. Three (3) district delegates from the district of each Representative in the United States House of Representatives from each state.

3. Fourteen (14) delegates at large for the District of Columbia, four (4) delegates at large for Guam, fourteen (14) delegates at large for Puerto Rico, and four (4) delegates at large for the Virgin Islands. Provided that if Puerto Rico shall become a state prior to the next national convention it shall have its delegates based upon the same formula as the other states.

4. From each state casting its electoral vote, or a majority thereof for the Republican nominee for President in the last preceding election: Four and one-half (4½) delegates at large plus the number of the delegates at large equal to 60% of the electoral vote from each such state. Except that if Puerto Rico shall become a state prior to the next national convention it shall be presumed that it would have cast its electoral vote, or a majority thereof, for the Republican nominee at the last preceding election.

In addition, delegates at large shall be awarded to a state for any and each of the following public officials elected by such state in the year of the last preceding Presidential election or at any subsequent election held prior to January 1, 1984:

(a) One for each Republican United States Senator: Provided that no such additional delegate at large award to any state shall exceed two;

(b) One for a Republican governor: Provided, that no such additional delegate at large award to any state shall exceed one; or

(c) One for Republican membership of at least half of the state's delegation to the United States House of Representatives: Provided, that no such additional delegate at large award to any state shall exceed one.

In the computation of the number of delegates at large, any sum of the four and one-half (4½) plus the 60% representing a fraction shall be increased to the next whole number.

5. If the District of Columbia cast its electoral vote, or a majority thereof, for the Republican nominee for President in the last preceding Presidential election: Four and one-half (4½) delegates at large, plus the number of delegates at large equal to 30% of the fourteen (14) delegates at large alloted to the District of Columbia. In the computation of the number of delegates at large, any sum of the four and one-half (4½) plus the 30% representing a fraction shall be increased to the next whole number.

6. Any state which would receive fewer delegates under all provisions of this rule than it received to the 1972 Republican National Convention shall have its number of delegates increased to the same number of delegates it received to the 1972 Republican National Convention.

B. Alternate Delegates

One (1) alternate delegate to each delegate to the national convention.

ELECTION OF DELEGATES TO NATIONAL CONVENTION

RULE NO. 31

Delegates at large to the national convention and their alternates and delegates from Congressional districts to the national convention and their alternates shall be elected in the following manner:

(a) By primary election in according with the applicable laws of such states as required by law, the election of delegates to the national conventions of political parties by direct primary and in the District of Columbia in accordance with its law; provided, that in any of these in which Republican representation upon the Board of Judges or Inspectors of Elections for such primary election is denied by law, delegates and alternates shall be elected as hereinafter provided.

(b) By Congressional district or state conventions, as the case may be, to be called by the Congressional district or state committees, respectively. Notice of the call for any such convention shall be published in a newspaper or newspapers of general circulation in the Congressional district or state, as the case may be, not less than fifteen (15) days prior to the date of said convention.

(c) By the Republican state committee or governing committee in any state in which the law of such state specifically authorizes the election of delegates or alternates in such manner.

(d) In selecting delegates and alternates to the national convention, no state law shall be observed which hinders, abridges or denies to any citizen of the United States, eligible under the Constitution of the United States, to the office of President or Vice President, the right or privilege of being a candidate under such state law for the nomination for the President or Vice President; or which authorizes the election of a number of delegates or alternates from any state to the national convention different from that fixed in these rules.

(e) In a Congressional district where there is no Republican Congressional Committee, the Republican state committee shall issue the call and make said publication.

(f) All delegates from any state may be chosen from the state at large, in the event that the laws of the state in which the election occurs, so provide.

(g) Alternate delegates shall be elected to said national convention for each unit of representation equal in number to the number of delegates elected therein and shall be chosen in the same manner, at the same time, and under the same rules the delegates are chosen; provided, however, that if the law of any state shall prescribe the method of choosing alternates they shall be chosen in accordance with the provisions of the law of the state in which the election occurs.

(h) The election of delegates and alternates from the District of Columbia, Guam, Puerto Rico, and the Virgin Islands shall be held under the direction of the respective recognized Republican governing committee therein in conformity with the rules of the Republican National Committee or the laws of the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

(i) Election of delegates and alternates shall be certified in every case where they are elected by conventions, by the chairman and secretary of such conventions, respectively, and forwarded to the secretary of the Republican National Committee, and in the case of election by primary, they shall be certified by the proper official and all certificates shall be forwarded by said duly elected delegates and alternates in the manner herein provided.

(j) All delegates and alternates shall be elected not later than thirty-five (35) days before the date of the meeting of said national convention, unless otherwise provided by the laws of the state in which the election occurs.

(k) Delegates and alternates at large to the national convention when serving as delegates and alternates shall be duly qualified voters of their respective states. All delegates and alternates allocated as delegates and alternates at large shall be elected at large in the several states unless otherwise mandated by state law.

(l) Delegates and alternates to the national convention, representing Congressional districts, shall be residents and qualified voters in said districts respectively when serving as delegates and alternates. All delegates and alternates allocated to represent Congressional districts shall be elected by the Congressional district of the several states unless the laws of the state shall otherwise mandate.

(m) No delegate or alternate delegate shall be required to pay an assessment or fee in excess of that provided by the law of the state in which the election occurs as a condition of serving as a delegate or alternate delegate to the Republican National Convention.

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No. 83-1225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NORMAN E. WYMBS, *et al.*,

Petitioners,

v.

REPUBLICAN STATE EXECUTIVE COMMITTEE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

A rule of the National Republican Party, which is reflected at the state level in a rule of the Florida Republican Party, provides for the selection of three delegates to the Republican National Convention from each congressional district.

The question presented is whether a suit by members of the Florida Republican Executive Committee, naming only that state committee and not the Republican National Committee as a defendant and asserting that the state party rule results in a denial of the equal protection of the laws because the number of registered Republicans varies from one Florida congressional district to another, is justiciable.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT	1
The Pertinent Party Rules	2
History Of The Litigation	4
REASONS FOR DENYING THE WRIT	6
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page
Baker v. *Carr*, 369 U.S. 186 (1962)	6, 8, 10, 11
Bode v. *National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971)	12
Burns v. *Richardson*, 384 U.S. 73 (1966)	10
Chicago & Southern Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948)	11
Cousins v. *Wigoda*, 419 U.S. 477 (1975)	7, 10, 11
Democratic Party of the United States v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981)	4, 6, 7, 9, 11
Gaffney v. *Cummings*, 412 U.S. 735 (1973)	10
Georgia v. *National Democratic Party*, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971)	12
Glidden v. *Zdanok*, 370 U.S. 530 (1962)	11
Gray v. *Sanders*, 372 U.S. 368 (1968)	11-12
Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792)	11
Irish v. *Democratic-Farmer-Labor Party*, 399 F.2d 119 (8th Cir. 1968)	12
Moore v. *Ogilvie*, 394 U.S. 814 (1969)	11
O'Brien v. *Brown*, 409 U.S. 1 (1972)	7, 11
Redfearn v. *Delaware Republican State Committee*, 524 F.2d 1403 (3d Cir. 1975), *aff'g* 393 F. Supp. 372 (D. Del. 1975), *cert. granted*, 426 U.S. 919, *vacated and remanded*, 429 U.S. 809 (1976), 547 F.2d 1163 (3d Cir. 1976) (on remand)	12-13
Redfearn v. *Delaware Republican State Committee*, 362 F. Supp. 65 (D. Del. 1973), *rev'd*, 502 F.2d 1123 (3d Cir. 1974)	12-13
Republican State Central Committee of Arizona v. *Ripon Soc'y, Inc.*, 409 U.S. 1222 (1972)	11
Ripon Soc'y, Inc. v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976)	12, 14

Table of Authorities Continued

Page

United States v. *Jones*, 119 U.S. 477 (1886) 11

Wymbs v. *Republican State Executive Committee*, 658 F.2d 324 (5th Cir. 1981) 1, 4

Wymbs v. *Republican State Executive Committee*, 719 F.2d 1072 (11th Cir. 1983) ..... *passim*

CONSTITUTION

United States Constitution

Article III 6, 8, 10

Amendment I 5, 10, 13

Amendment XIV 1, 5, 13, 14

STATUTES AND RULES

Florida Statutes Annotated

Section 101.021 3

Section 103.101 3

Federal Rules of Civil Procedure

Rule 19 ..... 6, 8

Rule 19(a) 7

National Republican Party Rules

Rule 30 ..... 2, 7

Rule 30.A.1 3

Rule 30.A.2 2

Rule 30.A.4 3

Rule 31 7

Rules of Procedure, Republican Party of Florida

Rule 11 ..... 2, 4

Rule 11, § 1 3

Rule 11, § 2 3

Rule 11, § 3 3

Rule 11, § 4(b) 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1225

NORMAN E. WYMBS, *et al.*,

Petitioners,

v.

REPUBLICAN STATE EXECUTIVE COMMITTEE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The original opinion of the district court and its opinion on remand are not reported. The opinion on remand is reproduced in the appendix to the petition, pages A15-A39. The first opinion of the court of appeals is reported at 658 F.2d 324. The court of appeals' opinion accompanying the decision of which review is requested (Pet. App. A40-A84) is reported at 719 F.2d 1072.

STATEMENT

This suit was instituted by three members of the Republican State Executive Committee of Florida who assert that the equal protection clause of the Fourteenth Amendment forbids that committee to select three delegates to the quadrennial Republican National Convention from each congressional dis-

trict in Florida. The Executive Committee is the only defendant named in the complaint.[1]

The Pertinent Party Rules

Petitioners' challenge is to Rule 11, § 4(b), of the Florida Republican Party's Rules of Procedure (Pet. App. A10- A11). That state rule, however, merely implements one part of the rules of the National Republican Party that allocate National Convention delegates among and within the states and territories.[2] The pertinent rules of the National Republican Party granted to Florida 51 delegates to the 1980 National Convention and, because of reapportionment following the 1980 census and Florida's performance in the 1980 election, grant Florida 82 delegates to the 1984 convention. Of the respective totals, 45 were selected in 1980 and 57 will be selected in 1984 under National Party Rule 30.A.2,[3] which calls for "three . . . district delegates from the district of each

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[1] Petitioners' complaint also challenged the composition of the Executive Committee itself as a denial of equal protection. They asserted that, unless reconstituted, the committee could not constitutionally exercise several of its functions, such as adopting rules for selecting National Convention delegates and filling vacancies on the ballot for state offices, because its membership consists of two persons from each county in Florida and the counties have differing numbers of registered Republicans. The court below rejected this challenge (Pet. App. A71-A84), and the issue is not pressed in the petition.

[2] State Party Rule 11 in terms speaks only to the selection of delegates to the 1980 Republican National Convention. Since the ruling below, the respondent Executive Committee has adopted a rule for the 1984 National Convention consonant with the National Party's rules and therefore in the same pattern as Rule 11.

[3] National Party Rule 30 traces back to a rule adopted at the 1972 Republican National Convention and reenacted at the 1976 and 1980 conventions.

Representative in the United States House of Representatives." (Pet. App. A85.)[4]

The rules of the National Republican Party allow the selection of National Convention delegates by primary election, by district or state convention, or by the Republican state committee. By its rules, the Florida Republican State Executive Committee has chosen to follow the results of the Florida preference primary provided for by state law, Fla. Stat. Ann. § 103.101 (Pet. App. A1-A6), in selecting its National Convention delegates. Rule 11, §§ 1, 2 (Pet. App. A10). Only registered Republicans can vote on the Republican side of the Florida primary, only registered Democrats on the Democratic side. Fla. Stat. Ann. § 101.021.

The state party's rules award the at-large delegates to the "Republican presidential candidate receiving the higher or highest number of statewide votes" in the primary. Rule 11, § 2 (Pet. App. A10). The delegates from each congressional district are awarded to the presidential candidate receiving the most primary votes in that district. *Id.* The people who serve as delegates are selected after the primary, in part from lists provided to by the presidential candidates' organizations. *Id.* § 3 (Pet. App. A10-A11). The at-large delegates are selected by the full State Executive Committee, and the congressional district delegates are "elected by a majority vote of the total respective state committeemen, state committeewomen and county chairmen representing any county in each congressional district . . . ." *Id.* § 4(b) (Pet. App. A11).

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[4] Florida had 15 congressional districts in 1980 and now has 19. There were in addition in 1980 six at-large delegates under National Party Rule 30.A.1 (Pet. App. A85), and there are for the 1984 convention those six and nineteen bonus delegates that result from the success of the Republican ticket in Florida in the 1980 election, National Party Rule 30.A.4 (*id.* at A85-A86).

History Of The Litigation

This case was instituted in January 1980. The theory of the complaint was that, because the number of registered Republicans varies from one congressional district to another, the plaintiffs, residents of one of the districts with a larger than average Republican registration, were denied the equal protection of the laws in the selection of National Convention delegates. No state official who administers the state election law was named a defendant. Nor was the Republican National Committee. The State Executive Committee was alleged to be engaging in state action in promulgating Rule 11 and selecting convention delegates according to the preferential primary returns.

On July 1, 1980, the district court granted petitioners' motion for summary judgment. The court held that the Fourteenth Amendment imposes a "one-Republican, one-vote" rule in allocating convention delegates within a state on the basis of a presidential preference primary and therefore forbids the state party to follow the national party rule by selecting three delegates from each congressional district. The court suspended the operation of its injunction until after the 1980 Republican National Convention. The Court of Appeals for the Fifth Circuit vacated that judgment and remanded the case for reconsideration in the light of this Court's intervening ruling in *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), that "[a] political party's choice among the various ways of determining the makeup of a state's delegation to the party's national convention is protected by the Constitution." *Wymbs* v. *Republican State Executive Committee of Florida*, 658 F.2d 324, 325 (5th Cir. 1981), *quoting from La Follette*, 450 U.S. at 124.

On remand, the district court again held the Florida Republican Party rule unconstitutional. (Pet. App. A15-A17, A18-A39.) On appeal, the United States Court of Appeals for the Eleventh Circuit reversed and instructed the district court to dismiss the complaint.

In the district court and on appeal the respondent Executive Committee raised a number of defenses: that it was not the state for purposes of the Fourteenth Amendment; indeed that, as a private political association, it was entitled by the First Amendment to order and manage its affairs without state or other governmental interference; and that, in any event, there could not possibly be any equal protection violation in the selection of equal numbers of National Convention delegates from districts required by Constitution and statute to be as nearly equal in population as humanly possible.

The court of appeals found it unnecessary to consider these contentions, except insofar as a political party's First Amendment freedom from governmental interference entered into its decision that there was no justiciable controversy. In a thorough and thoughtful opinion the court ruled that plaintiffs were debarred at the threshold. In presenting to the court an internal political party dispute, they had presented it with a case that was not suitable for adjudication. For one thing, the plaintiffs had not joined the Republican National Committee as a party, which meant that the district court's decree would not "provide the plaintiffs effective relief." (Pet. App. A58.) The plaintiffs had attacked only the state rule providing for three delegates from each congressional district, but, the court said, "[t]hat rule does not control what Florida delegates are admitted to the convention . . . ." (*Id.* at A71.) The court went on:

> "The National Rules control this issue, but [plaintiffs] failed to sue the Republican National Committee, thus denying the court the power to afford [them] effective relief. Besides this potentially fatal joinder problem, the strong first amendment associational freedoms possessed by political parties limited the district court's ability to tell the Republican Party how to conduct its internal affairs and whom it should represent. Finally, enforcement of a one Republican, one vote rule would pose insurmountable practical and legal problems for the district court." (*Id.*)

REASONS FOR DENYING THE WRIT

The decision below turns in substantial part on petitioners' failure to sue the right people and attack the right rule. To that extent it plainly presents no question of general importance. So far as the court's other reasons for finding petitioners' complaint nonjusticiable are concerned, they are in full accord with doctrines established by pertinent decisions of this Court. The court's decision does not conflict with any decision of any other court of appeals.

The court of appeals routinely and correctly applied the provisions of Rule 19 of the Federal Rules of Civil Procedure in finding that the Republican National Committee was a necessary party not joined. That "potentially fatal joinder problem" combined with First Amendment associational freedoms of a political party emphasized by this Court in *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), and the problems of fashioning an effective decree to make plaintiffs' case unfit for adjudication by an Article III court. There is nothing in the analysis of the justiciability issue by the court below, applying standards this Court enunciated in *Baker* v. *Carr*, 369 U.S. 186 (1962), to warrant further review by this Court.

Moreover, the very great likelihood is that the justiciability issue would not be reached by this Court or would not in any event be determinative of the ultimate outcome of the lawsuit, because respondent's contentions on the merits of petitioners' equal protection claim would be accepted either here as alternative grounds for sustaining the court of appeals' judgment or on remand by that court.

1. Petitioners' position in this Court is premised, as it was below, on the mistaken view that "Florida law authorizes the [Florida] Republican State Executive Committee to adopt rules" governing the selection of delegates to the Republican National Convention. (Pet. 2.) The State of Florida neither authorizes Florida Republicans to send delegates to the quadrennial convention of the National Republican Party nor

establishes the number of delegates Florida Republicans may send or how those delegates are to be selected. These matters are governed by the rules of the National Republican Party, as adopted by the 1980 National Republican Convention, specifically Rules 30 and 31. (Pet. App. A85-A89.) These rules require that there be three delegates "from" each congressional district throughout the United States. (See *id.* at A52-A54.)

Florida Republicans may send delegates to the Republican National Convention only to the extent that the rules for the convention authorize them to do so and may select their delegates only in accordance with those rules. That point is settled by decisions of this Court, three of them, all handed down within the last 12 years: *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Cousins* v. *Wigoda*, 419 U.S. 477 (1975); and *O'Brien* v. *Brown*, 409 U.S. 1 (1972). The authority for the Florida Republican Party rules is National Rules 30 and 31, not any provision of Florida law.

2. Because the Republican National Convention is the arbiter of compliance with its rules, no court could grant effective relief in this case, even if petitioners had a right to the constitutional ruling they seek. The respondent State Executive Committee is the only defendant in this case, and no effort was ever made to name another. Because the Republican National Committee is the sole representative of the national party between conventions, only an order directed against the national committee could affect the determination of who is authorized to be seated as a convention delegate. For this reason the court of appeals was incontestably correct in ruling that the district "court's injunction will have no effect on the National Convention." (Pet. App. A58.) Rule 19(a) of the Federal Rules of Civil Procedure requires the presence as a party of any person in whose "absence complete relief cannot be accorded among those already parties . . . ." It accordingly follows, as the court of appeals ruled, that petitioners' failure to sue the Republican National Committee denies the federal courts the power to "provide . . . effective relief" in this case. (Pet. App. A58.)

The petition scarcely acknowledges the role that this procedural defect in petitioners' case played in the decision below. Petitioners indicate that they would be content with a judgment affecting only the Florida delegate selection process without regard to whether the delegates selected were seated at the convention. (Pet. 8-9.) But the court of appeals was clearly right that such a judgment "would be, at best, of trifling effect." (Pet. App. A69.) It would not relieve petitioners' "real complaint." (*Id.*) Petitioners' professed willingness to accept an empty judgment does not cure the Rule 19 problem or the related Article III problem of the inability of a court in this case to enter a binding judgment (pp. 10-11, *infra*).

The routine application of Rule 19 by the court of appeals obviously presents no issue worthy of review by this Court.

3. To be sure, the court below did not pursue the "potentially fatal joinder problem" (Pet. App. A71) to its ultimate resolution because other factors combined with it to make petitioners' case unfit for judicial disposition. (*Id.* at A58, A71.) Those other factors are solidly grounded in decisions of this Court and fit within the criteria set forth in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), that the court invoked in its treatment of justiciability: it found that petitioners sought "an initial policy determination of a kind clearly for nonjudicial discretion," and that there were no "judicially discoverable and manageable standards for resolving" their complaint. (Pet. App. A61-A62.)

Because the analysis by the court below is so solidly grounded in this Court's decisions, there is no warrant for further review by this Court even apart from the presence of the plainly noncertworthy joinder issue.

a. The court concluded from its analysis that "to provide the relief [plaintiffs have] requested would require this Court to engage in political party policy making beyond its role in society and beyond our ken as article III judges" (Pet. App. A62), and that the controversy that the dissident Florida Republican plaintiffs took to court and away from their party's own open forums "is a disagreement over a pure question of

internal Republican Party policy" (*id.* at A63-A64). The court noted in support of its conclusion the words uttered by this Court concerning a similar controversy over the manner of choosing National Convention delegates just a few terms ago. The Court said then that "it is not for the courts to mediate the merits of this dispute. . . . [A] court may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of the United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981).

Clearly petitioners do ask for the substitution of a court's judgment for a judgment made by their party on a matter of great political moment—how the party's constituency is to be defined. The resolution of that question requires a policy determination that is solely for party members and not for judges: how best can the Republican Party further its goals and protect its interests. Those goals and interests are many in number, sometimes contradictory, and all politically sensitive. Although petitioners assert that delegates to the Republican National Convention "represent no constituency other than registered Republicans" (Pet. 8), their party has made a different judgment. The Republican Party, a minority party within the country and in Florida, has determined that it can best select a presidential nominee by having at its national conventions a solid core of delegates whose homes are spread evenly throughout the national population, three to each congressional district. This, the national party has concluded, is one of the means of enlarging the chance that the candidate the delegates nominate will win in a vote of a national population among whom Republicans are in the minority. Even if this policy had not succeeded, as it has in five of the last eight presidential elections, it would not be for the courts to second-guess it.

Furthermore, the court of appeals said, even if it had the general competence to "define the constituency of the Florida Republican Party and decide how that constituency could best be represented at the National Convention, we would be constrained by the Party's countervailing First Amendment rights of free speech and association." (Pet. App. A67.)

The *La Follette* decision, quoted just above, sustained the freedom of the Democratic Party under the First Amendment to reject a slate of delegates chosen in accordance with a state's primary election law. The "strong and time honored rights of free speech and association" (Pet. App. A67) of political parties are as proof against judicial interference as they are against the legislative interference threatened in *La Follette*. In *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975), this Court said that a political party and its members "enjoy a constitutionally protected right of political association," and that " 'any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' "

b. Petitioners' case also lacks the "judicially discoverable and manageable standards to resolve the controversy presented" that *Baker* v. *Carr* demands. Even if a court could authoritatively define the constituency of a Republican National Convention delegate and did so in accordance with petitioners' proposal—"all registered Republicans"—there would still be a "lack of judicially discoverable and manageable standards for" deciding how to ensure representation of that constituency. This Court has found that apportionment based even on total voter registration is suspect, in part because of the possibility of fortuitous fluctuations in the number of registered voters. *Burns* v. *Richardson*, 384 U.S. 73, 93 (1966); *see also Gaffney* v. *Cummings*, 412 U.S. 735, 746-48 (1973). Party registration, accurately described by the Court below as "very fluid" (Pet. App. A70, n.36), provides an even less secure base for apportionment. Moreover, its use would pose practical problems of constructing districts that would, in the court's considered view, prevent a court from giving effect to petitioners' "delegate selection scheme." (Pet. App. A70.)

In addition, the court below held, under the rubric of the judicial standards criterion of *Baker* v. *Carr*, that there is no way for an Article III court "to resolve the controversy" that petitioners tried to present, *i.e.*, no means of fashioning "an effective remedy." (Pet. App. A68.) The Republican National Convention, not the authorities of Florida (and not a federal

court), decides what delegates from Florida are to be seated by the Convention. Therefore, any judgment entered on petitioners' complaint would not bind the parties sought to be affected and would amount to an advisory opinion, in derogation of "the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties," *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948).[6] (Pet. App. A68-69.)

4. There is no inconsistency between the decision below, applying as we have just seen the recognized criteria of *Baker* v. *Carr*, and any other decision of this Court. The Court has consistently expressed its doubts that internal party disputes such as this one are justiciable. *O'Brien* v. *Brown*, 409 U.S. 1, 4 (1972); *Cousins* v. *Wigoda*, 419 U.S. 477, 483 n.4 (1975); *see also Republican State Central Committee of Arizona* v. *Ripon Soc'y, Inc.*, 409 U.S. 1222 (1972) (Rehnquist, J., in chambers). Most recently, in *La Follette*, the Court while deciding the case on First Amendment grounds used language of justiciability in sustaining a political party's freedom from legislative or judicial interference. (P. 9, *supra*.)

Of course, this Court sits to adjudicate the claims of political parties and their adherents that they have been denied access to the ballot, as in *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), with which petitioners erroneously suggest an inconsistency (Pet. 6), and claims of disfranchisement or dilution or distortion of votes in the election of public officials, as in *Gray* v. *Sanders*, 372 U.S. 368 (1968), on which petitioners rely heavily. There is no such denial of access to the ballot or disfranchisement or its equivalent here. Of *Gray* v. *Sanders*—invalidating the use by Georgia of the infamous county unit system to determine the winner in a statewide Democratic primary that at that time was conclusive of the general election—it is enough to say that

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[6] See also Glidden Co. v. Zdanok, 370 U.S. 530, 569 (1962); United States v. Jones, 119 U.S. 477, 478 (1886); Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).

the Court disclaimed reaching "the questions that would be presented" if a state nominating convention rather than a primary election were being used to select candidates for statewide office. 372 U.S. at 378, n.10.

Similarly, there is no conflict between the decision below and the decision of any other court of appeals. Indeed, the decision below comports precisely with the ruling of the Court of Appeals for the Eighth Circuit in *Irish* v. *Democratic-Farmer-Labor Party*, 399 F.2d 119, 121 (8th Cir. 1968), that an action complaining of malapportionment in the selection of delegates to the Democratic National Convention was nonjusticiable. Panels of the Court of Appeals for the District of Columbia Circuit some years ago entertained national party delegate disputes as justiciable,[7] but when such a dispute later came before the court *en banc*, it expressly reserved the question of justiciability thought to be resolved by the earlier panel decisions. The court said that the question was "of obvious difficulty." *Ripon Soc'y, Inc.* v. *National Republican Party*, 525 F.2d 567, 577 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976). Several judges expressed the view that the case was not justiciable. *Id.* at 592-95 (Danaher, J.); 602-04 (Tamm, J.); 609-12 (Wilkey, J.).

As for *Redfearn* v. *Delaware Republican State Committee*, 524 F.2d 1403 (3d Cir. 1975), with which petitioners claim a conflict (Pet. 6-7), the cited decision is a notation of affirmance without opinion of the judgment of a district court that did entertain and decide a delegate apportionment dispute.[*] The

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[7] Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971).

[*] The district-court judgment affirmed at 524 F.2d 1403 is not Redfearn v. Delaware State Republican Committee, 362 F. Supp. 65 (D. Del. 1973), as indicated in the petition (p. 6, n.18), but Redfearn v. Delaware State Republican State Committee, 393 F. Supp. 372 (D. Del. 1975), a decision on remand following reversal, 502 F.2d 1123 (3d Cir. 1974), of the first-reported district-court decision.

court of appeals' decision was vacated by this Court, after certiorari had been granted, 426 U.S. 919, for further consideration in the light of intervening legislation. 429 U.S. 809 (1976).[9]

5. If the issue of the justiciability of internal political party disputes over convention delegates, their selection and seating has not been squarely decided by this Court, it is only because in every case the decision on the merits has been in favor of the freedom of the party from judicial interference. And so it would be here if the issues on the merits were presented to this Court on certiorari as alternative reasons for affirmance or to the court of appeals on remand.

a. Petitioners, who neglected to sue any state electoral official or agency, cast the Florida Republican Party in the unlikely role of the State of Florida, subject to constitutional restraints applicable only to the states and other governmental entities. The casting is unlikely because under the Constitution, as this Court has construed the First Amendment, the State of Florida must stay at arm's length or even farther from the affairs of the Republican Party; and because the Florida Republican Party is not responsible for running Florida's primary election or making the rules for it. The party has simply chosen to use the results of the election, governed by state law, as the basis for its selection of convention delegates.

b. If the Florida Republican Party were treated as the state and if the equal protection clause were applied in its full rigor to the party's selection of convention delegates, there would be no doubt that the use of equally populated congressional districts as the basis for delegate selection satisfies all the demands of equal protection. Some of the reasons why

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[9] The final entry in the log of the case is the court of appeals' vacation, without opinion, of the district court's judgment and remand to that court in accordance with this Court's direction. 547 F.2d 1163 (3d Cir. 1976).

overall population and not party registration might rationally be chosen as the criterion for allocating and selecting delegates have been mentioned in the discussion of justiciability. (Pp. ——, *supra*.) They and others were discussed in the thoughtful opinion of Judge McGowan for the en banc court in *Ripon Soc'y, Inc.* v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976). In the *Ripon* case, the predecessor to the National Rule 30 that governs here was sustained against an assertion that, to comply with the equal protection clause, the Republican Party must allocate its delegates nationwide either on the basis of total population or on the basis of Republican strength. In rejecting the equal protection challenge, the court said that "a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution as much if not more than its condemnation." *Id.* at 585 (emphasis in original). Some of the relevant considerations that demonstrated the rationality of the party's choice not to adhere rigidly to either population or manifested Republican strength were summarized by the court below (Pet. App. A.64, n.28):

> "In addition to promoting the party's ideology and nominating successful candidates, a party's goals may include 'rallying of voters . . . not only in an appeal to party members but to independent voters and even to members of an opposition party,' *Ripon*, 525 F.2d at 593; encouraging the participation of minorities, women and young people, id. at 583-84; and according greater weight in party decision making to 'professionals,' id. at 585, or to geographic segments of the party's constituency whose performance suggests likely success or, conversely, a need for retrenchment."

CONCLUSION

No issue is presented that warrants of review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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